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tatus: GRANTED

Title: Richard Solorio, Petitioner  
V.  
United States

ocketed:  
arch 26, 1986

Court: United States Court of Military  
Appeals

Counsel for petitioner: Bruce Jr., Robert W.

Counsel for respondent: Solicitor General

EDITOR'S NOTE

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ntry	Date	Note	Proceedings and Orders
1	Mar 26 1986	G	Petition for writ of certiorari filed.
2	Apr 2 1986		Brief amicus curiae of American Civil Liberties Union filed.
3	Apr 24 1986		Brief amicus curiae of Defense Appellate Division, US Army filed.
4	Apr 25 1986		Brief amicus curiae of Defense Division U.S. Navy-Marine Corp Appellate Review filed.
6	Apr 25 1986		Order extending time to file response to petition until May 25, 1986.
7	May 27 1986		DISTRIBUTED. June 12, 1986
8	May 27 1986	X	Brief of respondent United States in opposition filed.
9	Jun 16 1986		Petition GRANTED. *****
10	Jul 21 1986		Record filed.
11	Jul 24 1986		Joint appendix filed.
12	Jul 30 1986		Brief of petitioner Richard Solorio filed.
13	Jul 30 1986		Brief amicus curiae of American Civil Liberties Union filed.
14	Jul 31 1986		Brief amicus curiae of Defense Division U.S. Navy filed.
15	Jul 31 1986		Brief amicus curiae of Defense Appellate Division, US filed.
17	Jul 31 1986		Brief amicus curiae of Vietnam Veterans of America filed.
18	Aug 5 1986	G	Motion of American Civil Liberties Union for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Aug 27 1986		Order extending time to file brief of respondent on the merits until September 20, 1986.
21	Sep 24 1986		Motion of American Civil Liberties Union for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
22	Sep 22 1986		Brief of respondent United States filed.
23	Oct 10 1986		CIRCULATED.
24	Dec 19 1986		SET FOR ARGUMENT. Tuesday, February 24, 1987. (1st case).
25	Feb 11 1987		Reply brief of petitioner Richard Solorio filed.
26	Feb 24 1987		ARGUED.

85 - 1581 (1)

No.

FILED

MAR 26 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

RICHARD SOLORIO  
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF MILITARY APPEALS

ROBERT W. BRUCE, JR.  
*Lieutenant Commander*  
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March 1986

91 PM



## QUESTIONS PRESENTED

- I. May a court find that an offense committed off-base at a place where there is no military post or enclave is service-connected simply because of the civilian dependent status of the victim?
- II. May a court depart from its precedents setting out the constitutional limits of court-martial jurisdiction over offenses against civilian dependents and apply a more expansive interpretation in the very same case?

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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No. \_\_\_\_\_  
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RICHARD SOLORIO  
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT.  
\_\_\_\_\_

**PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF MILITARY APPEALS**  
\_\_\_\_\_

Petitioner, Richard Solorio, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals entered in this proceeding on January 27, 1986.

**OPINIONS BELOW**

The opinion of the Court of Military Appeals is reported at 21 M.J. 251 (C.M.A. 1986) (Appendix 1a-17a). The opinion of the Coast Guard Court of Military Review appears at 21 M.J. 512 (C.G.C.M.R. 1985) (Appendix 18a-42a).

**JURISDICTION**

The judgment of the Court of Military Appeals was entered on January 27, 1986, affirming the Coast Guard

Court of Military Review's decision granting the government's appeal and reversing the trial judge's ruling dismissing several charges and specifications for lack of subject matter jurisdiction. The jurisdiction of this Court is invoked under 28 U.S.C. §1259.

#### CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Article III, §2, C1. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ."

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be . . . deprived of life, liberty, or property, without due process of law; . . ."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . ."

The Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984, provide as follows:

Rule 201(b): "Requisites for court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise, for a court-martial to have jurisdiction:

\* \* \*

(5) The offense must be subject to court-martial jurisdiction.

#### Discussion

*See* R.C.M. 203. The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. . . ."

Rule 203: "Jurisdiction over the offense. To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war."

The discussion and analysis of Rule 203, are attached as Appendix 43a-48a and Appendix 49a-54a, respectively.

#### STATEMENT OF THE CASE

The petitioner, an enlisted man in the Coast Guard, was charged with fourteen specifications alleging indecent liberties, lascivious acts and indecent assault in violation of Article 134, Uniform Code of Military Justice [UMCJ],<sup>1</sup> six specifications alleging assault in violation of Article 128, UCMJ,<sup>2</sup> and one specification alleging attempted rape in violation of Article 80, UCMJ.<sup>3</sup> The court-martial invoked jurisdiction under Article 2, UCMJ, 10 U.S.C. §802. At a pre-trial hearing on June 3 and 4, 1985, petitioner made a motion to dismiss all the charges and specifications alleging assaults and attempted rape, and seven of the specifications alleging indecent liberties, lascivious acts and indecent assault in violation of Article 134, UCMJ, for lack of subject matter jurisdiction.

<sup>1</sup> 10 U.S.C. §934.

<sup>2</sup> 10 U.S.C. §928.

<sup>3</sup> 10 U.S.C. §880.



The fourteen specifications petitioner moved to dismiss all alleged offenses at Juneau, Alaska. The seven remaining specifications alleged similar, but unrelated, offenses at Governors Island, New York, a Coast Guard base.

After hearing evidence and argument on the motion, the trial judge dismissed the fourteen specifications alleging offenses at Juneau and the charges of violating Article 128 and Article 80, UCMJ, because the offenses lacked service-connection. The trial judge made findings of fact<sup>4</sup> on the record (Appendix 55a-61a) and prior to authenticating the record attached supplemental findings of fact (Appendix 62-63a).

The dismissed charges and specifications allege offenses against two girls. *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985). The fathers of these girls were, like petitioner, active duty members of the Coast Guard assigned to the staff of the Commander, Seventeenth Coast Guard District. *Id.* All the offenses allegedly occurred in petitioner's privately owned home eleven miles from the Federal Office Building in downtown Juneau where he worked. *Id.* The alleged victims and their families also lived in civilian housing, there being no government quarters in Juneau for anyone other than the District Commander. *Id.*

In Juneau at the time of the alleged offenses, there was no Coast Guard controlled post or enclave where many service personnel lived and worked. *Id.* at n.1. The closest equivalent in Juneau was the Coast Guard Station, a 1.3 acre facility with a complement of fourteen enlisted persons. *Id.* Over two hundred Coast Guard military personnel were assigned to the district office, occupying four of the nine floors of the Juneau

<sup>4</sup> Rule 905(d), Rules for Court-Martial, Manual for Courts-Martial, United States, 1984, requires the military judge to state his essential findings of fact on the record when factual issues are involved in determining a motion.

Federal Office Building, where other Federal agencies are also located. *Id.* The Coast Guard Marine Safety Office situated in a building adjacent to the Federal Office Building had a military complement of seventeen persons. *Id.* With the possible exception of some of the complement of six officers and forty-nine enlisted personnel on the buoy tender berthed at the Coast Guard Station, all of the approximately three hundred Coast Guard military personnel in Juneau lived in the civilian community. *Id.*

A friendship had grown between petitioner and the families of the alleged victims, grounded in one case on the common sporting interests of bowling and basketball, and in the other, on the fortuity of living next door. *Id.* at 514. The alleged victims came to petitioner's home on a regular basis to visit with his two sons. *Id.* Both girls at one time played on a soccer team coached by petitioner and they bowled in a league in which he was active. *Id.* These associations were much more significant than any military relationship between petitioner and the fathers of the alleged victims, which the trial judge found to be *de minimis*. Record at 131 and Appendix at 58a.

There was no evidence that any of the allegations have become common knowledge, even among the Coast Guard personnel, at Juneau. No allegations were made against petitioner until all parties had been permanently transferred to duty stations outside Alaska. *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985). Petitioner was stationed at Juneau from November 1980 to June 1984. Appellate Exhibit IV. Warrant Officer Johnson and his family, including Amber Johnson, left Juneau in June 1983. Record at 43 and Appellate Exhibit VI. Amber did not make any allegations against petitioner until March 1985. Record at 47. Petty Officer Grantz and his family, including Jennifer



Grantz, left Juneau in June 1984. Record at 60. Jennifer did not make any allegations against petitioner until about April 1985. Record at 63.

The Alaska prosecutor, in a letter to the Coast Guard, stated "that at this time, subject to future evaluation or developments, that the Department of Law, Criminal Division, State of Alaska, will defer prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutorial arm of the Coast Guard." Appellate Exhibit IX. However, there was also evidence that the State of Alaska had recently prosecuted two similar cases involving members of the Coast Guard with results highly satisfactory to the Coast Guard. Appellate Exhibit X. And at trial, Special Agent Gary Smith testified that the State of Alaska was continuing to investigate allegations that the accused had sexually abused the children of other civilians still living in Juneau. Record at 87.

The accused is presently assigned to Coast Guard Group New York at Governors Island, New York, where he lives in Government quarters and where the instant general court-martial was convened. *United States v. Solorio*, 21 M.J. 512, 514 (C.G.C.M.R. 1985).

In his findings of fact, the trial judge addressed the twelve *Relford* factors<sup>5</sup> and the nine additional *Relford* considerations,<sup>6</sup> and found that none of them supported a finding of service-connection. Additionally, the military judge considered, among other things, the military relationship between petitioner and the servicemember fathers of the alleged victims, the effect of the alleged offenses on morale, discipline or effectiveness within the military community in Juneau, the reputation of the Coast Guard with the civilian community in

<sup>5</sup> See *Relford v. Commandant*, 401 U.S. 355 (1971), and Appendix at 44a-46a.

<sup>6</sup> *Id.*

Juneau, the relation of the offenses alleged to have been committed in Alaska to the offenses alleged to have been committed in New York, and the impact of the alleged offenses on the servicemember fathers of the alleged victims and through them on the service. The military judge found that the asserted impact upon the service was too remote and indirect to support service-connection.<sup>7</sup>

The government appealed the military judge's ruling to the Coast Guard Court of Military Review and that court granted the government's appeal, reversing the military judge. Before the Coast Guard Court of Military Review petitioner argued, in opposition to the government's appeal, that the military judge had properly applied the service-connection test required by *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), and properly found that the facts of this case did not support subject matter jurisdiction.

The United States Court of Military Appeals granted review of the Coast Guard Court's decision and affirmed. In his petition for grant of review, petitioner argued that the Court of Military Review's decision was incorrect because it had not properly applied the service-connection test required by *O'Callahan*, and *Relford*, and because the military judge had properly found that the facts did not support subject matter jurisdiction.

<sup>7</sup> "In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service-connection. That indirect impact consists of servicemember-parents' preoccupation with family situation affecting the members' performance, some initial counseling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J." Military Judge's Supplemental Findings of Fact, Appendix at 62a-63a and *United States v. Solorio*, 21 M.J. 251, 253 (C.M.A. 1986).

Petitioner made a motion to the Court of Military Appeals to stay the court-martial proceedings to permit him to petition for a writ of certiorari. By its order dated February 5, 1986, the Court of Military Appeals denied the motion. Petitioner then made application to Chief Justice Warren E. Burger for a stay of the court-martial proceedings pending timely filing and disposition of a petition for a writ of certiorari. The Chief Justice denied the application on February 10, 1986.

The court-martial proceedings went forward on February 18, 1986, and on March 11, 1986, petitioner was convicted of eight of the fourteen specifications alleging offenses in Alaska. Petitioner was also convicted of four of the seven specifications alleging offenses in New York.

#### REASONS FOR GRANTING THE WRIT

There is good cause to grant this petition for a writ of certiorari because the United States Court of Military Appeals' decision in this case conflicts with this Honorable Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971). The Court of Military Appeals' decision expands court-martial subject matter jurisdiction far beyond the constitutional limits spelled out in *O'Callahan* and *Relford*.

In this case, the Court of Military Appeals has obviously employed its flexible subject matter jurisdiction analysis;<sup>8</sup> an analysis that is not bound by the result that

<sup>8</sup> The United States Court of Military Appeals began its departure from what it termed a "slavish" application of the *Relford* criteria in *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980). It has continued this trend in its decisions in *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Johnson*, 17 M.J. 73 (C.M.A. 1983); and in the instant case.

application of the *Relford* factors and considerations requires, and that does not set any limits on other criteria that may be considered. This analysis renders the service-connection test so pliable it is meaningless and it provides servicemembers no protection of their constitutional rights. It gives military courts a completely free hand to find that service-connection exists on the basis of any single factor or combination of factors, tangible or intangible, proven or presumed. Moreover, by rejecting the *Relford* factors and considerations as controlling, the Court of Military Appeals' decision, at the very least, sets the law of service-connection back to the time, after *O'Callahan* but before the *Relford* decision, when the "infinite permutations of possibly relevant factors"<sup>9</sup> created doubt and confusion about the limits of subject matter jurisdiction.

Clearly, however, the Court of Military Appeals' flexible service-connection test is being used, case by case, to eviscerate the *O'Callahan* and *Relford* decisions. In *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980), the Court of Military Appeals extended military subject matter jurisdiction to all drug offenses. In this case it has extended military subject matter jurisdiction to all sex offenses against dependents. In its latest subject matter jurisdiction case, the Court of Military Appeals has indicated that it may be willing to accept the position that all offenses committed by officers are service-connected. *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

Another strong reason to grant this petition is that the record does not and cannot support subject matter jurisdiction. Petitioner submits that the trial judge was correct in finding that the Coast Guard lacked subject

<sup>9</sup> *O'Callahan v. Parker*, *supra* at 284 (Harlan, J., dissenting).



matter jurisdiction over the charges and specifications he dismissed. There is no Coast Guard post or enclave, in the usual sense of those terms, at Juneau and the offenses have not become public knowledge in Juneau; therefore, any impact of these offenses on the Coast Guard has been remote and indirect as the trial judge properly found.

The Court of Military Appeals' decision does not address the *Relford* factors and considerations, or the fact that the trial judge considered all of them and did not find a single one that supported service-connection. Instead, the decision relies principally on a holding that, as a matter of law, the impact of the dismissed offenses on the fathers of the alleged victims caused an impact on the Coast Guard sufficient to support subject matter jurisdiction. This holding bases jurisdiction solely on the dependent status of the victims and is inconsistent with the trial judge's finding of fact that the impact of the dismissed offenses on the fathers of the alleged victims had only a remote and indirect impact on the Coast Guard. See note 7, *supra*.

The Court of Military Appeals' application of its expansive subject matter jurisdiction test to petitioner is grounds for summary reversal. Whether or not that Court's interpretation of the reach of the Uniform Code of Military Justice conflicts with this Court's decisions, its application to petitioner in this case violates Fifth Amendment due process. *Marks v. United States*, 430 U.S. 188 (1977); *Bowie v. City of Columbia*, 378 U.S. 347 (1964).

In *Marks*, this Court held that the application of a decision expanding the constitutional reach of a statute, that proscribed conduct in sweeping language, to conduct that occurred before the decision was improper. In that case, the constitutional limits on statutes proscribing obscenity were relaxed in a decision rendered after the defendants had allegedly transported obscene ma-

terial in interstate commerce. The application of the more expansive standard for obscenity to the defendants there was held to violate the Due Process Clause because it would have the same effect as an *ex post facto* law.

Here, the Court of Military Appeals has relaxed the constitutional limits on the reach of the Uniform Code of Military Justice, and in particular Articles 80, 128 and 134, 10 U.S.C. §§80, 128 and 134, as they relate to off-base sex offenses against civilian dependents. Those statutes proscribe conduct of servicemembers in sweeping language that this Court has confined within constitutional limits in *O'Callahan* and *Relford*. This decision is contrary to the Court of Military Appeals' own precedents which held that conduct like that involved here was beyond the reach of the Uniform Code of Military Justice. *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969).

The Court of Military Appeals, however, did not address the due process issue in this case. The Court merely stated that:

Admittedly, our precedents involving off-base sex offenses against civilian dependents of military personnel would point to a different conclusion. See, e.g., *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). However, as we made clear in *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980), which concerned drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience. [Footnote omitted].

*United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986).

The comment in a case concerning drug activity that "some" earlier opinions on service-connection need to be reexamined certainly cannot have satisfied the petitioner's right to fair warning about the reach of military statutes proscribing sex offenses. For one thing, the most significant rationale for the *Trottier* decision was that, because of their impact on military readiness, "it is necessary and proper in today's world that court-martial jurisdiction over most drug offenses be invoked as a proper exercise of the war powers." *United States v. Trottier, supra*, at 352. There has been no suggestion that off-base sex offenses similarly affect military readiness or are otherwise related to authority stemming from the war power.

Furthermore, the expansion of the reach of the Uniform Code of Military Justice to these offenses deprives petitioner of constitutional trial rights that even Congress could not retroactively strip from him. Such a law would be an *ex post facto* law. If Congress cannot pass such a law, the Court of Military Appeals cannot achieve the same result by judicial construction. *Bowie v. City of Columbia, supra* at 353-354. Of course, Congress has not attempted to legislatively expand military jurisdiction over off-base sex offenses, even prospectively.

Although this case can be disposed of by a summary reversal, this Court should address the subject matter jurisdiction issues presented. Clearly, the military courts, following the lead of the Court of Military Appeals, are going to continue to find jurisdiction in every significant case until this Court reaffirms *O'Callahan* and *Relford* as the law, or sets some other reasonable limits on the criteria that can support military jurisdiction.

This Court observed in *O'Callahan* and *Relford* that Article I, §8, cl.14 and the Fifth Amendment allow Congress to create military courts which need not provide all the procedural safeguards essential in an Article III court. On the other hand, the Court found that in cases not subject to courts-martial, Article III, §2, cl.3, the Sixth Amendment, and possibly the Fifth Amendment, guarantee the rights to indictment by grand jury and trial by jury before a civilian court.

This Court has clearly stated that it intends the service-connection test to balance these constitutional rights of servicemembers against the military's interest in trying the case at a court-martial. While acknowledging that the special needs of the military justify a separate military justice system, the Court recognized that "expansion of military discipline beyond its proper domain carries with it a threat to liberty." *O'Callahan v. Parker, supra*, at 265. Moreover, the Court observed "the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to the 'least possible power adequate to the end proposed.'" *Id.* (citing *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

The Court of Military Appeals' decision, however, does not give proper consideration to the interests of servicemembers. It suggests that any asserted impact upon the military, regardless of how remote or indirect, will be sufficient to outweigh the servicemember's constitutional rights. The Court of Military Appeals seems to have embraced the position of one writer who has suggested that the imagination of the government is the only limitation on court-martial subject matter jurisdiction.<sup>10</sup>

<sup>10</sup> Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F.L.Rev. 1 (1985).



The Court of Military Appeals' decision sets this area of the law back to the time before *Relford* explicitly spelled out clear standards for deciding whether or not subject matter jurisdiction exists. Justice Harlan, dissenting in *O'Callahan v. Parker*, *supra*, stated:

the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible. . . . Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdiction issue in each instance.

*Id.* at 284. He concluded, "the Court has thrown the law in this realm into a demoralizing state of uncertainty." *Id.* at 275.

In *Relford*, this Court reiterated that a crime must be service-connected to be tried by court-martial, but acknowledged that the *O'Callahan* decision had met with some generally critical comments including those of, then, Professor Everett. *Id.* at 357. The Court noted that some of the criticism expressed concern, as had Justice Harlan's dissent, about the confusion that *O'Callahan* might cause.<sup>11</sup> *Id.* Therefore, in *Relford* this Court clearly set out its analysis of the service-connection issue and that analysis has served as a model which has been followed by lower courts for more than

<sup>11</sup> Chief Judge Everett wrote in his article, *O'Callahan v. Parker—Milestone or Millstone in Military Justice?*, 1969 Duke L.J. 853, at 869, "[c]riticism of the majority opinion would be more muted if it had given a clearer test for deciding when military jurisdiction exists."

ten years. That service-connection analysis has eliminated the potential for confusion in this area of the law by limiting the "infinite permutations of possibly relevant factors" to the twelve "*Relford* factors" and nine additional considerations.

Prior to the *Relford* decision, it was those who favored expansive military jurisdiction that seemed most concerned about the unlimited factors that could be considered in deciding whether or not an offense was service-connected. They were concerned that military interests would not receive proper consideration. Now it is the servicemember who is concerned that his individual interests are not being protected. While rejecting the *Relford* factors and considerations as too inflexible, the Court of Military Appeals has not placed any limitations on other factors that can support subject matter jurisdiction. In this case, and in others,<sup>12</sup> the Court of Military Appeals has indicated that any single factor or combination of factors, tangible or intangible, proven or presumed, may be sufficient to find that an offense is service-connected.

The Coast Guard Court of Military Review's decision in this case is a perfect example of how ready military courts are to exercise and expand this freedom to find jurisdiction based on the flimsiest claim of military interest. That decision bases subject matter jurisdiction primarily on the potential impact on petitioner's military neighbors at Governors Island. The impact was inferred entirely from the nature of the alleged offenses, even though the offenses allegedly occurred many months before they were disclosed and thousands of miles from Governors Island. Although the government had the burden of proving jurisdiction by a preponderance of the evidence, *see* Rules for Courts-

<sup>12</sup> See note 8, *supra*.

Martial (R.C.M.) 905(c)(1), and 905(c)(2)(B), Manual for Courts-Martial, United States, 1984 (MCM 1984), the Coast Guard Court inferred the potential impact without any proof of actual impact on Governors Island.

As this obviously suggests, the Court of Military Appeals' flexible analysis permits military courts to broadly infer impact from the nature of the offense. As a result, an offense may be found to be service-connected *per se*, in violation of this Court's requirement for a fact based determination of service-connection. See *Relford v. Commandant*, *supra* at 365-366. The Court of Military Appeals' decision, in this case, certainly implies that every sex offense committed by a servicemember against a child dependent is *per se* service-connected. *United States v. Solorio*, 21 M.J. 251, 256 (C.M.A. 1986).

No previous case has held that the dependent status of a victim is sufficient to support subject matter jurisdiction over an offense that has no significant and direct impact on the military. The dependent status of the victims was one of the factors supporting jurisdiction in *Relford*; but there were other significant factors, including the fact that the offenses were committed on a military post. In this case, however, the offenses occurred in the petitioner's private home in the civilian community, at a place where there is no military post at which servicemembers and their families live. Furthermore, the offenses have never become public knowledge, even among servicemembers, at the place where they occurred.

By Executive Order, the law of *O'Callahan*, and *Relford*, have been incorporated into the regulations that govern courts-martial. Rule 201(b), R.C.M., MCM 1984, states that courts-martial only have jurisdiction over offenses that are subject to court-martial jurisdiction. Rule 203, R.C.M., MCM 1984, makes any offense under the Uniform Code of Military Justice subject to

court-martial jurisdiction, to the extent permitted by the Constitution.

The Discussion and Analysis of Rule 203 were published by the Department of Defense in conjunction with the Department of Transportation. They are nonbinding, but they are entitled to great deference and weight because they set forth the drafters' views of the state of the law of subject matter jurisdiction. The Discussion of Rule 203 clearly reflects the continuing vitality of this Court's decisions in *O'Callahan* and *Relford*.

The section on "Determining service-connection" in the Discussion of Rule 203, begins with a recitation of the twelve factors and the nine additional considerations enumerated in *Relford*. See Appendix at 44a-46a. There is no hint in either the Discussion or the Analysis of Rule 203 that the dependent status of a victim is, by itself, sufficient to establish service-connection. Therefore, the Court of Military Appeals' decision, not only fails to follow this Court's decisions in *O'Callahan* and *Relford*, it conflicts with the settled law of subject matter jurisdiction, as understood and described by the drafters of Rule 203.

The Court of Military Appeals' has erred in suggesting that developments in the military and in society since the *O'Callahan* and *Relford* decisions justify rejection of its own precedents which properly applied those decisions. *United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986). The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Relford* were decided.

Our society's increased concern for the victims of crime is no more reason to take the right to a civilian trial away from servicemembers than it is a reason for subjecting civilians to trial by court-martial. Any victim who felt that "a military trial is marked by the age-old



manifest destiny of retributive justice"<sup>13</sup> might prefer a trial by court-martial. That does not, in any way, justify depriving an accused of constitutionally protected trial rights.

Increased concern for victims is not a singularly military phenomenon. State officials would have been equally interested in protecting the victims' rights, if this case had been tried in state court. As the Court of Military Appeals has pointed out, Congress and state legislatures have made changes in civilian criminal systems to protect more fully the rights of victims. *United States v. Solorio*, 21 M.J. 251, 254-255 (C.M.A. 1986). Civilian courts, certainly, have not interpreted such changes as authority for the abridgment of constitutionally protected trial rights.

Although this petition for a writ of certiorari results from the affirmance of a decision granting a government appeal, the petition should be granted at this time. The subject matter jurisdiction issues are collateral to, and separable from, the merits of petitioner's court-martial. They have already been completely developed, and resolved in a fully dispositive decision. Clearly, the most compelling reason for granting the petition now is that petitioner may never again be able to ask this Court to consider this case, except by a collateral attack or a petition for extraordinary relief, even though he has been convicted and sentenced to a bad conduct discharge and a year of confinement.

This is a case where immediate review should be allowed because the question of jurisdiction has been finally decided, with further proceedings on the merits subsequently completed, but in which later review of the jurisdiction issue may be frustrated, despite the ultimate outcome of the case. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). There is no

question of the Court's jurisdiction to review the case at this time. Under 28 U.S.C. §1259 and Article 67(h), UCMJ, 10 U.S.C. §867(h) (1984), this Court may review any decision of the Court of Military Appeals, whether final or not, except for a decision not to grant a petition for review.

On the other hand, in the normal course of appellate review this Court will have no jurisdiction to review this case unless the Court of Military Appeals reviews it again. The Court of Military Appeals, of course, reviews only a small fraction of the cases eligible for review. Therefore, this may be the last opportunity for the United States Supreme Court to address the important issues presented, in this case.

Moreover, failure to grant the petition at this time poses a threat of serious erosion of the important rights underlying the *O'Callahan* and *Relford* decisions; the servicemember's right, against subjection to excessive assertions of military jurisdiction, and to trial by a civilian court. If immediate review is not permitted, the Court of Military Appeals can ignore this Court's precedents with impunity, and continue to expand subject matter jurisdiction, in cases brought to it on government appeals.

This Court has often recognized the need to review judgments that have not terminated the proceedings. See *Abney v. United States*, 431 U.S. 651 (1977), *Stack v. Boyle*, 342 U.S. 1 (1951) (both on appeal from pretrial orders in federal criminal proceedings); *Gillespie v. United States Steel Corp.* 379 U.S. 148 (1964), *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) (both on appeal from decisions in federal civil actions while further proceedings were pending); *Cox Broadcasting Corp. v. Cohn*, *supra* (on appeal from decision in state court while further proceedings were pending).

<sup>13</sup> *O'Callahan v. Parker*, *supra* at 266.

The question of military jurisdiction in this case will not be meaningfully reviewed again in the military courts. All of the relevant facts were marshaled at the pre-trial hearing on jurisdiction. Petitioner's trial on the merits has not produced any additional facts that could affect the military courts' decisions on jurisdiction, since those decisions are essentially based on just the dependent status of the victims or the general nature of the offenses. Therefore, immediate appeal should be permitted.

#### CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Military Appeals.

Respectfully submitted,

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March 1986

APPENDIX

## APPENDIX A

UNITED STATES, Appellee,

v.

RICHARD SOLORIO, YEOMAN FIRST CLASS

U.S. COAST GUARD, Appellant.

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No. 53603.

CGCM Misc. No. 004-85.

U.S. Court of Military Appeals.

Jan. 27, 1986.

Accused, yeoman first class, United States coast guard, was charged with numerous sex offenses involving minor female dependents of fellow coast guardsman, which offenses allegedly occurred in Alaska and subsequently at Governor's Island. The military judge dismissed charges and specifications concerning Alaska offenses. The Coast Guard of Military Review, 21 M.J. 512, reversed. Accused petitioned for review. The Court of Military Appeals, Everett, C.J., held that service connection existed notwithstanding that offenses occurred off base while accused was properly absent from his unit and in a place not under military control.

Affirmed.

### **1. Military Justice §1411**

A military judge's fact-finding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62. UCMJ, Art. 62, 10 U.S.C.A. §862.

### **2. Military Justice §555**

Off-base sex offenses allegedly committed by accused on minor daughters of fellow coast guardsman assigned



to the same district office as accused were subject of court-martial jurisdiction, notwithstanding that accused was properly absent from his unit and that offenses occurred in a place not under military control; departing from *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94; *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322; *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313. UCMJ, Arts. 39(a), 80, 128, 134, 10 U.S.C.A. §§ 839(a), 880m, 928, 934.

### 3. Military Justice § 552

Lack of in personam jurisdiction over a civilian who commits a crime having great impact on service personnel does not mean that there would be no court-martial jurisdiction over the same crime if committed by a service member.

### 4. Military Justice § 555

Sex offenses against young dependents of military personnel have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned and such effects tend to establish service connection necessary for court-martial of service member who perpetrates the offenses.

### 5. Military Justice § 555

Because accused's transfer from Alaska, where alleged sex offenses on minor daughters of fellow service member occurred, to Governor's Island, where accused allegedly perpetrated similar offenses on minor daughter of another service member, was a routine matter and in no way undertaken with a view to creating court-martial jurisdiction, it was appropriate, in determining service connection, to consider the situation as it presently existed and not merely as it existed in Alaska

when the crimes were committed but before they were discovered; same observation applied with respect to the Governor's Island offenses as regards consideration of similar offenses committed some months after charged offenses.

### 6. Military Justice § 552

Pendency of subsequent offenses for trial by general court-martial is relevant in determining service connection of prior, similar offenses.

For Appellant: *Lieutenant Commander Robert Bruce* (argued).

For Appellee: *Lieutenant Commander Thomas J. Donlon* (argued).

### *Opinion of the Court*

EVERETT, Chief Judge:

Yeoman First Class Richard Solorio was charged under Articles 80, 128, and 134 of the Uniform Code of Military Justice, 10 U.S.C. §§ 880, 928, and 934, respectively, with numerous sex offenses involving females under the age of 16, each of whom was the daughter of a Coast Guardsman. Fourteen specifications alleged misconduct occurring at Juneau, Alaska, between March 1982 and June 1984; and seven specifications concerned misconduct at Governor's Island during the period from November 20, 1984, to January 5, 1985. In a session under Article 39(a), UCMJ, 10 U.S.C. § 839(a), prior to trial, the defense moved to dismiss all the charges and specifications concerning the alleged offenses committed in Alaska on the grounds that they were not subject to court-martial jurisdiction. See *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649, 28 L.Ed.2d 102 (1971); *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683, 23 L.Ed.2d 291 (1969). After receiving

evidence and hearing argument, the military judge made findings of fact; and, based on those findings, he granted the motion to dismiss.

The Government appealed from this ruling pursuant to Article 62, UCMJ, 10 U.S.C. § 862, and the Coast Guard Court of Military Review reversed the military judge's ruling. 21 M.J. 512 (1985). In turn, Solorio petitioned this Court for review and moved for a stay in his trial, which meanwhile had been set for December 3, 1985. A hearing took place on this motion and on the petition, at which time counsel for the parties ably argued their respective contentions as to the court-martial's jurisdiction over the offenses dismissed by the military judge. We now conclude that the decision of the Court of Military Review was correct, and the Government should be allowed to proceed to trial on the specifications involving alleged misconduct at Juneau, Alaska.

# I

At trial, counsel for the parties marshaled all available evidence and presented cogent arguments in support of their respective positions; and the military judge conscientiously made findings of fact as he sought to apply the criteria relevant in determining the issue of service-connection. *See Relford v. Commandant, supra*. According to these findings, Solorio

was properly absent from his unit at the time of each . . . [offense in Juneau].

– Each offense . . . occurred away from any military base at the accused's residence in the civilian community.

– Each offense . . . occurred in a place not under military control.

\* \* \* \* \*

[T]here was no connection between the accused's military duties and the alleged offenses.

– The victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses.

– Civilian courts are present [in Alaska] and available to adjudicate the offenses. While the State of Alaska has presently deferred prosecution in light of this proceeding, the State has not waived prosecution, nor declined to prosecute.

– Accused was not in uniform and in no way flouted military authority at the time of the alleged offenses.

– None of the alleged offenses posed a threat to any military installation . . . [or] resulted in any violation of military property.

– All the alleged offenses are of the type traditionally prosecuted by civilian courts and are specifically of the type the Coast Guard has recently consented to have civilian courts prosecute Coast Guard members for in Alaska.

\* \* \* \* \*

There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions. The impact apparent in this case, that is, on the parents and the victims themselves is no different than that which would be produced by civilian perpetrator.

\* \* \* \* \*

There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. As to the effect of the alleged incidents toward the Coast Guard within the



civilian community, there has been speculation by military personnel, but little more. . . . There is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles. I find no adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents. . . . The impact of the alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of court-martial jurisdiction in these circumstances. In this regard, I note the increased caution of the parents victims may now exercise over their children, the requirements for counseling, anxiety, and time away from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. There has been no impact on transfer of military personnel within the meaning of the Personnel Manual provisions which have been taken judicial notice of. There have been transfers of all involved parties without restrictions.

Among supplementary findings subsequently made by the judge were these:

4. Crime has an impact. The impact is felt on the victim and on those close to the victim. It is also reflected in the greater society of which the victim and offender are a part. Impact may be direct or indirect. In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service connection. That indirect impact consists of servicemember-parents' preoccupation with family situation affecting the members' performance, some initial counseling and referral from

persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J. Good order, discipline, morale and welfare of servicemembers have not been directly impacted. Service reputation has not been adversely affected and those attributes of service reputation in a community which have been testified about, for example, credit worthiness, job stability for spouses, members' and families' access to community activities; would not be negatively impacted if these offenses were to come to light.

\* \* \* \* \*

6. The offenses alleged to have occurred in Alaska are significantly remote in time and place from those alleged to have occurred in New York.

The Court of Military Review concluded that in his findings the judge had erred in several important respects. For one thing,

it was error for the judge to base his assessment of impact on the Juneau command solely on the observed effect after departure of all parties.

A more relevant finding in this area would pertain to the impact of these offenses on morale and discipline at Governors Island, where the accused is now stationed and living on base. The judge made no specific findings, however, with respect to the possible effect of the offenses on morale, good order and discipline within any command at Governors Island or on personnel under the authority and responsibility of the convening authority, Commander, Third Coast Guard District.

21 M.J. at 519. The Court of Military Review also disagreed

with the judge's conclusion that the concern of the parents in this case "would be the same whether the



status of the offender were military or civilian." Such a conclusion overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed violative offenses, of the nature alleged, upon their daughters and the natural expectation of the fathers that those in positions of authority and responsibility within the Coast Guard would take appropriate action to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another.

Finally, the court below disputed a finding by the military judge "that 'there has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses.'" A letter from the Office of the District Attorney in Juneau indicated that state officials would "defer" to prosecution of Solorio by the Coast Guard. The Court of Military Review concluded that "[t]here is no assurance, however, that upon reconsideration the Alaskan authorities will decide to prosecute these offenses, even if the judge's dismissal for lack of military jurisdiction is allowed to stand upon final review." *Id.* at 520.

## II

[1, 2] A military judge's factfinding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62, *see United States v. Burris* 21 M.J. 140 (C.M.A. 1985.) To some extent the Court of Military Review may have erred in this direction; but any such error is immaterial, because, on the basis of undisputed facts, we conclude that the offenses in Alaska were service-connected.

Admittedly, our precedents involving offbase sex offenses against civilian dependents of military personnel would point to a different conclusion. *See, e.g., United*

*States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), which concerned off-base drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience.<sup>1</sup>

In so holding, we were not trying to rewrite the Supreme Court's opinion in *O'Callahan*. Instead, we sought to apply *O'Callahan* – as amplified by *Relford* – to conditions as they now exist. Our premise was that *O'Callahan* permitted us to consider later developments in the military community and in the society at large and to take into account any new information that might bear on service-connection. *Cf. Home Bldg & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 442-43, 54 S.Ct. 231, 241-42, 78 L.Ed. 413 (1934); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387, 47 S.Ct. 114, 118, 71 L.Ed. 303 (1926).

One recent development in our society has been an increase in the concern for victims of crimes. *See, e.g.,* President's Task Force on Victims of Crime, Final Report (Dec. 1982); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss.L.J. 515 (1982). Thus, Congress<sup>2</sup> and state legislatures<sup>3</sup> have

<sup>1</sup> The doctrine of *stare decisis* should never be applied to perpetuate a view which no longer has a sound basis. *See United States v. Jacoby* 11 U.S.C.M.A. 428, 430, 29 C.M.R. 244, 246 (1960).

<sup>2</sup> *See, e.g.,* the Victim and Witness Protection Act, Pub.L. No. 97-291, 96 Stat. 1248 (codified at 18 U.S.C. § 1501 note, 1503, 1505, 1510, 1512 note, 1512-1515, 3146, 3579 note, 3580, Fed.R. Crim.P. 32(c)(2) (1982); Goldstein, *The Victim and Prosecutorial Discretion: The Federal Victim and Witness Protection Act of 1982*, 47 Law & Contemp.Probs. 225 (1984).

<sup>3</sup> Gittler, *Expanding the Role of Victim in a Criminal Action: An Overview of Issues and Problems*, 11 Pepperdine L.Rev. 117 (Symposium issue 1984).

sought to protect more fully the rights of victims; courts have attempted to make less onerous the participation of victims in criminal trials;<sup>4</sup> and in sentencing, judges have increasingly been willing to consider information about the psychological impact of various crimes on their victims.<sup>5</sup>

In the present case, the alleged victims were two young girls, each of whom was the daughter of a Coast Guardsman assigned to the same district office as Solorio. It is well-recognized that children are especially susceptible to lasting psychological harm as a result of various types of sexual offenses. Indeed, this probably is the main reason for the enactment of laws to prevent the sexual exploitation of children, *see, e.g.* 18 U.S.C. §§ 2251-55, and for judicial decisions upholding such laws. *See, e.g., New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). Not surprisingly, the child victims in this case began to receive psychological counseling after the crimes came to light.

When young children are sexually molested, parents also are in many ways victims of the crime. This seems especially true in the present case, for the parents were also receiving psychological counseling. Moreover, these parents were victimized financially, for they would have the legal responsibility to pay for any necessary medical and psychiatric treatment for their daughters—except to the extent that, as military dependents, the victims were entitled to medical care at government expense.

<sup>4</sup> *See, e.g., Morris v. Slappy*, 461 U.S. 1, 14, 103 S.Ct. 1610, 1617, 75 L.Ed.2d 610 (1983); Fed.R. Evid. 412 (rape shield).

<sup>5</sup> *United States v. Hammond*, 17 M.J. 218 (C.M.A.1984); *United States v. Marshall*, 14 M.J. 157 (C.M.A.1982). *See also Victim and Witness Protection Act, supra*, § 3, 96 Stat. 1249; Fed.R.Crim.P. 32(c)(2).

[3] The military judge found that “[t]he impact . . . on the parents” was “no different than that which would be produced by [a] civilian perpetrator.” The Court of Military Review questioned this conclusion because it “overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed violative offenses, of the nature alleged, upon their daughters.” 21 M.J. at 520. However, even if the judge’s finding was correct, it is not decisive as to court-martial jurisdiction. The lack of *in personam* jurisdiction over a civilian who commits a crime having great impact on service personnel does not mean that there would be no court-martial jurisdiction over the same crime if committed by a servicemember.

O’Callahan’s primary concern is with the impact of crimes on the armed services and their missions. Unless there is such impact, no reason exists not to allow a servicemember the right to a jury trial and grand-jury indictment which he generally would enjoy if tried in a civilian court. In seeking to demonstrate impact, the Government offered evidence that, because of the trauma resulting from learning of the offenses against their daughters, the fathers could not function as effectively in their Coast Guard duty assignments as they had previously.

Of course, prior to discovery of the offenses, Solorio had been transferred from Alaska and was no longer serving with them. However, if this had not occurred, it obviously would have been difficult—if not impossible—for the victims’ fathers to continue to serve in the District Office with him. Indeed, it is unlikely that Solorio and the two fathers could ever again be satisfactorily assigned together in one of the small units which is typical of the Coast Guard organization. Furthermore, because of the widespread hostility towards the offender that usually results from this type of sex offense, it would appear that Solorio’s future



assignments would be greatly limited due to the tensions that his presence would create in an organization.

[4] Obviously, not every off-base offense against a servicemember's dependent is service-connected. For example, an off-post larceny from a dependent usually would not have the continuing effects which would cause it to be classified as service-connected. However, sex offenses against young children – offenses like those alleged in the charges against Solorio – have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned. This continuing effect tends to establish service-connection.

In *O'Callahan*, the Supreme Court ruled that, despite a servicemember's military status, he could not be tried by a court-martial for offenses that were not service-connected. This result was based on the premise that such offenses were not within the legislative power "[t]o make rules for the Government and Regulation of the land and naval Forces." See U.S. Const. art. I, § 8, cl. 14. It would seem to be a necessary corollary that Congress could not prohibit conduct that lacked service-connection, even if violations of the prohibition were to be tried in Federal District Court, where every constitutional safeguard clearly would be available to defendants.

On this premise, the determination of service-connection should be made only in light of the conditions existing when the alleged misconduct occurred, because, unless service-connection existed at that time, the conduct falls outside Congress' power to punish and no crime has been committed. Accordingly, events which occurred after commission of an alleged offense would be immaterial to the issue of jurisdiction. This means that, for example, in determining service-connection of a service-member's off-post crime, only the likelihood and feasibility of civilian prosecution at the time of the

crime could be considered – even if the crime were not discovered for some time after its occurrence; and subsequent changes in State law and policy which might increase or decrease that likelihood would be disregarded.

However, it appears to us that the emphasis in *O'Callahan* was not on the scope of substantive congressional power to regulate a servicemember's off-duty, off-post conduct,<sup>6</sup> but instead was on assuring that, as far as feasible, servicemembers would retain their constitutional right to grand-jury indictment and trial by petit jury. Thus, in *Gosa v. Mayden*, 413 U.S. 665, 93 S.Ct. 2926, 37 L.Ed.2d 873 (1973), the Court declined to apply *O'Callahan* retroactively, even though it appears somewhat anomalous to sustain convictions for violating rules which Congress had no power to prescribe.

If factors such as the probability of trial in a civilian court are relevant in determining service-connection, then we should consider whether as a practical matter there is any likelihood that, if the charges are dismissed, Solorio will be prosecuted in an Alaskan court. The letter from the District Attorney's Office, which indicated that the State would defer prosecution in favor of a military trial, was given little weight by the military judge. Even though the Court of Military Review criticized him in this regard, we also would not attach great significance to such a document. Otherwise, military authorities anxious to try a servicemember by court-martial might endeavor to persuade civilian pros-

<sup>6</sup> It would seem that some acts on the part of servicemembers cannot be prohibited by Congress, no matter what might be the method for trying and punishing violations of the prohibition. Cf. *United States v. Nation*, 9 U.S.C.M.A. 724, 26 C.M.R. 504 (1958); *United States v. Wysong*, 9 U.S.C.M.A. 249, 26 C.M.R. 29 (1958); *United States v. Milldebrandt*, 8 U.S.C.M.A. 635, 25 C.M.R. 139 (1958).

ecutors to drop cases that they normally would prosecute, in an effort to create court-martial jurisdiction that otherwise would not exist.

[5, 6] On the other hand, we recognize that in cases like this, where the prospective defendant and the victims have left the State and moved to distant locations—Solorio to Governors Island; one of the victims and her father to the Washington, D.C. area; and the other to California—State officials are less likely to be interested in prosecuting. Moreover, if for some reason, the victims decide that they do not wish to go back to Alaska and undergo the trauma of testifying, it will be difficult to compel their attendance. Therefore, because Solorio's transfer to Governors Island was a routine matter and in no way undertaken with a view to creating court-martial jurisdiction, we conclude that it is appropriate to consider the situation as it now exists and not merely as it existed at Juneau when the crimes were committed but before they were discovered.

The same observation applies with respect to the commission of subsequent offenses at Governors Island. If service-connection must be determined solely in terms of events as they existed at the time of an alleged offense, then we could not take into account other offenses committed some months later. However, as we have indicated, *O'Callahan*—despite its reliance on Article I, section 8, cl. 14 of the Constitution—does not require that service-connection be evaluated in such a limited context. Accordingly, the pendency of the subsequent offenses for trial by general court-martial is relevant in determining service-connection.

In *United States v. Lockwood*, 15 M.J. 1 (C.M.A.1983), we declined to apply to the doctrine of “pendent jurisdiction” in deciding whether a court-martial was entitled to try certain offenses. Nonetheless, we observed that some of the factors which underlie that doctrine also

tend to establish service-connection. We noted the advantages in having all charges disposed of in a single proceeding and commented:

The Government has an interest in assuring that a servicemember receives an appropriate punishment for his crimes and that, if feasible, he is rehabilitated. When the responsibility for punishing a course of criminal conduct is divided between civilian and military authorities, these goals may be hindered. For one thing, the servicemember is subject to two convictions rather than one and this may carry adverse collateral consequences which make it more difficult for the accused to be rehabilitated. Since two trials must take place, rather than only one, the accused may undergo two ordeals and remain uncertain about his fate until the second trial is concluded. Commencing a successful rehabilitation program is more difficult until it becomes certain what the accused's punishment ultimately will be; so the commencement of successful rehabilitation may be delayed while awaiting the results of a second trial. Also, the military sentencing and correctional authorities may differ from their civilian counterparts in methodology and in goals; and these differences may complicate the rehabilitation process.

Further, we remarked:

The “practical reasons of dispatch” which have led to the military practice of joining all known offenses in a single trial also help support the conclusion that where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest, in turn, helps us provide a basis for finding service connection for the off-base offenses.

*Id.* at 8.

Admittedly, in the present case, the offenses in Juneau are not “related” in time or place to those at Governors Island. On the other hand, they are of a



similar type and probably result from the same underlying motive or predisposition. Indeed, the similarity is such that, even if not before the court-martial for trial, the offenses in Alaska might be admissible under Mil.R. Evid. 404(b); and apparently, if the military judge's ruling is upheld, the Government will seek to use evidence of these offenses pursuant to that rule. Moreover, the method of rehabilitation employed would seem to be the same for the Alaska and the Governors Island offenses; and the likelihood of successful rehabilitation for the latter offenses would be small if the others were still pending for trial. From the standpoint of the two girls and their parents, there also is the advantage that the trial by court-martial at Governors Island will promptly dispose of the offenses allegedly committed in Alaska and will eliminate the possibility that on two occasions, rather than one, the victims will have to give "public testimony about a humiliating and degrading experience such as was involved here." *Morris v. Slappy*, 461 U.S. 1, 103 S.Ct. 1610, 75 L.Ed.2d 610 (1983). Under these circumstances, there exists here "a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay," and "this interest, in turn, helps provide a basis for finding service connection for the off-base offenses."

When we consider the continuing effects of appellant's off-base misconduct on the servicemember fathers of the two victims, the resulting effect on other Coast Guardsmen and on that service, the unfeasibility of an Alaskan prosecution, and the importance to the Coast Guard of disposing of all the offenses promptly in a single trial, we are convinced that service-connection exists and that the court below correctly reversed the military judge.

### III

The petition for grant of review is granted. The motion for a stay is denied, and the motion to strike the affidavits is dismissed as moot.

The decision of the United States Coast Guard Court of Military Review is affirmed.

Judge COX concurs.

APPENDIX B

UNITED STATES COAST GUARD COURT OF  
MILITARY REVIEW  
Washington, DC

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UNITED STATES

v.

RICHARD SOLORIO  
YEOMAN FIRST CLASS, U. S. COAST GUARD

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Misc. Docket 004-85

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24 SEPTEMBER 1985

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LCDR ROBERT E. BRUCE, USCG  
APPELLATE DEFENSE COUNSEL  
LCDR THOMAS L. DONLON, USCG  
APPELLATE GOVERNMENT COUNSEL

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**OPINION OF THE COURT ON APPEAL OF THE  
GOVERNMENT FROM DISMISSAL OF CHARGES AND  
SPECIFICATIONS BY THE TRIAL JUDGE**

BAUM, Chief Judge:

This is the Coast Guard's first action under Article 62, UCMJ, 10 USC § 862, which became effective August 1, 1984 and authorizes appeals by the Government from certain orders and rulings of a military judge not amounting to findings of not guilty. The ruling from which the Government has appealed grants defense counsel's motion to dismiss various charges and specifications for lack of jurisdiction. In so ruling, the trial judge applied to the facts the doctrine of "service connection," first proclaimed in *O'Callahan v. Parker*,

(18a)

19a

395 U.S. 258, 89 S. Ct. 1683 (1969) and amplified later in *Relford v. Commandant*, 401 U.S. 355, 91 S. Ct. 649 (1971) and *Schlessinger v. Councilman*, 420 U.S. 738, 95 S. Ct. 1300 (1975).

In *O'Callahan v. Parker*, *supra*, the U. S. Supreme Court, analyzed the reach of court-martial jurisdiction for offenses committed within United States territorial limits during peacetime and rejected the Government-advanced argument that liability for trial by court-martial is simply "a question of 'status'—'whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'" 395 U.S. 267, 89 S. Ct. 1688. Instead, the Court said, "that is merely the beginning of the inquiry, not its end. 'Status' is necessary for jurisdiction; but it does not follow that ascertainment of 'status' completes the inquiry, regardless of the nature, time, and place of the offense." *Id.* The Court went on to say, "the crime to be under military jurisdiction must be service connected. . . ." 395 U.S. 272, 89 S. Ct. 1690. Since then, for offenses during peacetime committed inside the territorial limits of the United States, both person and offense must be found to be within a court-martial's ambit in order for there to be a trial. In making such determinations, military courts to this day have repeatedly faced the question of what must be shown to establish "service connection." *See generally* the recent cases of *U.S. v. Griffin*, \_\_\_MJ\_\_\_, ACM 24752 (AFCMR 5 September 1985); *U.S. v. Wilson*, Misc Dkt No. 85-08, (NMC MR 20 August 1985); *U.S. v. Benedict*, \_\_\_MJ\_\_\_, ACM 24444 (AFCMR 14 August 1985); *U.S. v. Roa*, 20 MJ 867 (AFCMR 1985); *U.S. v. Kyles*, 20 MJ 571 (NMC MR 1985); *U.S. v. Holman*, 19 MJ 784 (ACMR 1984), *U.S. v. Wojciechowski*, 19 MJ 577 (NMC MR 1984).



Assistance in making that judgment was provided in 1971 in *Relford v. Commandant, supra*, when the Supreme Court established a guideline for finding "service connection" and in the process carved out a service connected area where courts-martial are always appropriate, holding, "that when a serviceman is charged with an offense committed within or at the geographical boundary of a military post and violative of the security of a person or of property there, that offense may be tried by a court-martial." 401 U.S., 369, 91 S. Ct. 657.

All the dismissed offenses in the instant case were violations of the security of persons but they were not committed within or at the geographical boundary of a military post. They allegedly occurred in the accused's privately owned home eleven miles from the Federal Office Building in downtown Juneau, Alaska where he worked on the staff of Commander, Seventeenth Coast Guard District. The charges and specifications allege various offenses against two young girls, including attempted rape; indecent and simple assaults; lascivious acts; and indecent liberties. The alleged victims were between the ages of ten and twelve during the period when the offenses supposedly occurred. The fathers of these girls were also active duty members of the Coast Guard and they, too, were assigned to the Coast Guard District Commander's staff. They, also, lived in civilian housing, one next door to the accused and his family and the other a half mile away, there being no government quarters in Juneau for anyone other than the District Commander.<sup>1</sup>

<sup>1</sup> We judicially note that in Juneau there was no base or post for Coast Guard personnel of the kind referred to in *O'Callahan* and *Relford, supra*, that is, a large military controlled enclave where many service personnel live and work. The closest equivalent in Juneau was the Coast Guard Station, a small 1.3 acre facility with a complement of fourteen enlisted persons, without berthing and

A friendship had grown between the accused and both of the other families, grounded in one case, on the common sporting interests of bowling and basketball, and, in the other, on the proximity of living next door. The alleged victims came to the accused's home on a regular basis to visit with his two sons. Both girls at one time played on a soccer team coached by the accused and they also bowled in a league in which the accused was active. During their stay in Juneau, the girls displayed behavioral changes that concerned and perplexed their parents and, as a result, counseling was commenced for one girl. Whatever was causing such changes remained undetermined at the time, and the girls never made known the acts allegedly committed by the accused while they were in Juneau. It was not until all parties had been permanently transferred to different Coast Guard duty stations outside Alaska that any offenses came to light. They were first revealed when one of the girls confided in a school counselor. After that, the mat-

messing accommodations, but including, at the time in question: a pier for two boats and a Coast Guard buoy tender; one building for watchstanders which also housed a small exchange and two recreational clubs; and one open structure utilized as a covered work area for boat crews. Over two hundred Coast Guard military personnel were assigned to the District Commander's staff, occupying four of the nine floors of the Juneau Federal Office Building, where Federal court spaces, along with offices for various other Federal civilian agencies, were also located. The Coast Guard Marine Safety Office situated in a building adjacent to the Federal Office Building had a military allowance of seventeen persons. With the possible exception of some of the complement of six officers and forty-nine enlisted personnel on the buoy tender, all of the approximately three hundred Coast Guard military personnel in Juneau lived in the civilian community. This Coast Guard presence in Juneau is far less than the military concentrations found at typical installations of the other services, but not an insignificant number by Coast Guard standards, despite the lack of a base or post to house them.

ter was reported to Coast Guard authorities and an investigation was commenced. Initially, the other girl, who happened to be the one who received counseling in Juneau, refused to discuss the events with her parents. She continued to be silent with them, until she and her parents went to New York for the Article 32, UCMJ investigation hearing which had been convened to determine whether a general court-martial was warranted. Both of the girls and their parents are now undergoing counseling/therapy as a result of the matters alleged to have occurred.

The accused is assigned to Commander, Coast Guard Group New York at Governors Island, New York, a Coast Guard base, where he lives in Government quarters and where the instant general court-martial was convened by the senior Coast Guard officer at Governors Island, Commander, Third Coast Guard District. In addition to the charges which have been dismissed, eight similar offenses, involving two other minor dependent daughters of Coast Guardsmen, were also referred to trial. These remaining offenses are alleged to have occurred in quarters on base at Governors Island after the accused's transfer from Juneau. The Assistant District Attorney, Criminal Division/First Judicial District, State of Alaska, writing for the Attorney General, has stated in appellate exhibit IX of the record, "that the Department of Law, Criminal Division, State of Alaska, will defer the prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutorial arm of the Coast Guard," citing as one of the reasons for this action, the expense and difficulty involved in investigating and prosecuting a case where the alleged victims have been transferred from Alaska.

With this factual setting, we now must determine whether or not the judge was correct in dismissing the charges. In answering that question, two recent Court

of Military Review decisions bear consideration. In *U.S. v. Wilson*, *supra*, the Navy-Marine Corps Court of Military Review also faced an appeal by the Government from a military judge's ruling dismissing charges for lack of subject matter jurisdiction. In that case, the Court reversed the trial judge, finding there to be "service connection" in the off-base forcible sodomy and assault by a sailor on his active duty Army wife. Distinguishing features of fact prevent us from relying on the action of that Court, but we do agree with the emphasis placed by the Court on finding a distinct and greater interest in prosecuting by the military when compared with the interest of civilian authorities. The Air Force case of *U.S. v. Benedict*, *supra*, is closer to ours factually, involving, as it did, off-base indecent acts with a ten year old daughter of Air Force active duty parents, which the civilian authorities passed to the military for prosecution. The only significant difference between *Benedict*, and our case is the posture of review. In *Benedict*, the trial judge found "service connection" and the case was before the Air Force Court in the normal course of review under Article 66, UCMJ, permitting factual determinations at the appellate level, if necessary. On the other hand, we are bound by certain facts found at the trial level unless we determine that the judge's findings were incorrect as a matter of law.<sup>2</sup>

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<sup>2</sup> Article 62(b), UCMJ, 10 USC § 862(b), provides that on appeal by the United States of an order or ruling of the military judge, "the Court of Military Review may act only with respect to matters of law, notwithstanding section 866(c) of this title (Article 66(c))." This latter article authorizes Courts of Military Review, in the course of acting on findings of guilty and sentences, to "weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact. . . ." Article 66(c), UCMJ.



With respect to the legal issue of service connection, the Court in *Benedict* rejected, as controlling, a series of early decisions by the Court of Military Appeals that found no "service connection" for off-base sexual offenses involving civilian dependents of military personnel. *U.S. v. McGonigal*, 19 USCMA 94, 41 CMR 94 (1969); *U.S. v. Shockley*, 18 USCMA 610, 40 CMR 322 (1969); *U.S. v. Henderson*, 18 USCMA 601, 40 CMR 313 (1969). The Air Force Court based its rejection of these cases on more recent Court of Military Appeals and Courts of Military Review opinions which it saw as dramatically redefining the scope and parameter of military jurisdiction. *Murray v. Halderman*, 16 MJ 74 (CMA 1983); *U.S. v. Lockwood*, 15 MJ 1 (CMA 1983); *U.S. v. Trottier*, 9 MJ 337 (CMA 1980); *U.S. v. Shorte*, 18 MJ 518 (AFCMR 1984) affirmed by USCMA summary disposition on August 13, 1985; *U.S. v. Roa*, *supra*. We agree with the Air Force Court that these cases support an expanded view of court-martial jurisdiction. However, we believe it useful to turn, again, to the basic guidance provided by the Supreme Court in *Relford*.

In addition to the 12 elements inherent in the *O'Callahan* holding, the Court in *Relford*, *supra*, stressed nine other important criteria for consideration in making "service connection" determinations on a case by case basis. Quoting from *Relford*, with footnotes and citations omitted, those nine factors are:

- (a) The essential and obvious interest of the military in the security of persons and of property on the military enclave.
- (b) The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order.

(c) The impact and adverse effect that a crime committed against a person or property on military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

(d) The conviction that Article I, § 8, Cl. 14, vesting in the Congress the power "To make Rules for the Government and Regulation of the land and naval Forces." means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a serviceman-offender and turn him over to the civil authorities. The term "Regulation" itself implies, for those appropriate cases, the power to try and to punish.

(e) The distinct possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community.

(f) The very positive implication in *O'Callahan* itself, arising from its emphasis on the absence of service-connected elements there, that the presence of factors such as geographical and military relationships have important contrary significance.

(g) The recognition in *O'Callahan* that, historically, a crime against the person of one associated with the post was subject even to the General Article. The comment from Winthrop, *supra*, [W. Winthrop, *Military Law and Precedents* (2d ed. 1896, 1920 Reprint) at 724:

"Thus such crimes as theft from or robbery of an officer, soldier, post trader, or camp-follower \* \* \* inasmuch as they directly affect military relations and prejudice military disci-



pline, may properly be—as they frequently have been—the subject of charges under the present Article. On the other hand, where such crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.” (Footnotes omitted.)

cited both by the Court in *O’Callahan*, 395 U.S., at 274 n. 19, 89 S. Ct., at 1691 and by the dissent at 278-279, 89 S. Ct., at 1693-1694, certainly so indicates and even goes so far as to include an offense against a civilian committed “near” a military post. (h) The misreading and undue restriction of *O’Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law.

(i) Our inability appropriately and meaningfully to draw any line between a post’s strictly military areas and its nonmilitary areas, or between a serviceman-defendant’s on-duty and off-duty activities and hours on the post.

401 U.S. 367-369, 91 S. Ct. 656, 657.

At the completion of its analysis, the Court in *Relford* said:

“We recognize that any *ad hoc* approach leaves outer boundaries undetermined. *O’Callahan* marks an area, perhaps not the limit, for the concern of the civil courts and where the military may not enter. The case today marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time.”

401 U.S. 369, 91 S. Ct. 657.

Thus, the question for this Court is whether the facts surrounding the instant offenses, lying somewhere between *O’Callahan* and *Relford*, provide sufficient *indicia* of “service connection” to allow trial by court-martial. The Air Force with similar facts, as noted, said, “yes,” in *U.S. v. Benedict*, *supra*. The military judge here said, “no,” finding facts which indicated to him a lack of service connection. Now, we must determine whether his conclusion was correct or incorrect as a matter of law. In approaching this task, we must look carefully at the facts he found and, in the process, apply the *Relford* yardstick. Also of help in this regard is a statement by the Supreme Court in the later case of *Schlesinger v. Councilman*, *supra*, which placed particular emphasis on certain of the *Relford* factors. In that case the Court said:

[The service connection] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred.

420 U.S. 760, 95 S. Ct. 1314.

In evaluating the judge’s findings of fact, as stated earlier, we are not free to exercise our normal fact finding authority. Instead, we are limited to acting only “with respect to matters of law.” This, of course, is the same standard of review applicable to the U.S. Court of Military Appeals in every case considered by that Court, since Article 67(d), UCMJ says “The Court of Military Appeals shall act only with respect to matters of law.”

Accordingly, that Court's approach to issues in which questions of fact are integral and must, of necessity, be evaluated, should apply to this Court's process of review for Government appeals. In that regard, the standard set forth in *U.S. v. Middleton*, 10 MJ 123 (CMA 1981), while relating to the facts surrounding an issue of search and seizure and the question whether an accused had consented to the search, seems particularly pertinent to the evaluation we must make of the facts relating to the legal conclusion of "service connection." In *Middleton*, the Court said:

Whether consent was given must "be determined from the totality of all the circumstances." 412 U.S. at 227, 93 S. Ct. at 2047. Frequently, it poses issues of fact; but the ultimate question of the existence of consent involves application of a legal standard and so is subject to appellate review. See *United States v. Faruolo*, 506 F.2d 490, 496 (2nd Cir. 1974) (Newman, Dist. J., concurring). Thus, while always viewing the facts in the light most favorable to the Government, [the prevailing party at the trial level] see *United States v. Lowry*, 2 MJ 55 (C.M.A. 1976), this Court has appropriately concerned itself with whether those facts in any given case support the conclusion of consent. See, e.g., *United States v. Gillis*, 8 MJ 118 (C.M.A. 1979); *United States v. Aros*, 8 MJ 121 (C.M.A. 1979); *United States v. Mayton*, 1 MJ 171 (C.M.A. 1975); *United States v. Vasquez*, 22 U.S.C.M.A. 492, 47 C.M.R. 793 (1973). Nonetheless, to give due deference to the trial bench, a conclusion of consent reached below should not be disturbed unless it is unsupported by the evidence of record or was clearly erroneous. *United States v. Williams*, 604 F.2d 1102 (8th Cir. 1979); *United States v. McCaleb*, *supra*; *United*

*States v. Tolias*, 548 F.2d 277 (9th Cir. 1977); *United States v. Griffin*, 530 F.2d 739 (7th Cir. 1976). See *United States v. Vasquez*, *supra*.

Accordingly, we will give due deference to the findings of the trial judge, viewing the facts and evidence in a light most favorable to the accused who prevailed at trial, and will not disturb the judge's findings or "service connection" conclusion unless unsupported by the evidence or clearly erroneous. Accord *U.S. v. Postle*, 20 MJ 632 (NMCMR 1985).

Based on the evidence considered, the judge at trial found as fact that there was "a *de minimus* military relationship between the accused and the military fathers of the victims." He concluded that their relationship was "founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships." The judge also included the following in his statement of "essential findings of fact":

None of the alleged offenses posed a threat to any military installation. . . .

\* \* \* \*

There is no essential interest of the military in the security of person or property on post in this case.

\* \* \* \*

No issue challenges the Commander's responsibility and authority to maintain order.

There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions. The impact apparent in this case, that is,



on the parents and the victims themselves is no different than that which would be produced by [a] civilian perpetrator.

There has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses. To the contrary, Appellate Exhibit X [a Coast Guard message reporting conviction and sentencing in Alaska State Courts of two Coast Guardsmen on charges of sexual abuse of minors] suggests that civil courts in Alaska have recently produced results highly satisfactory to the military in similar cases. . . .

\* \* \* \*

. . . . There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. . . . I acknowledge a certain amount of logic in the judicial economy argument put forth by the Government and that political or economic considerations may support exercise by this Court of jurisdiction. However, those factors along with all others have not demonstrated a superior military interest in handling these offenses. . . . The impact of the alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of Court-Martial jurisdiction in these circumstances. In this regard, I note the increased caution of [sic] the parents [of the] victims may now exercise over their children, the requirements for counseling, anxiety, and time away

from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. . . .

\* \* \* \*

. . . . In light of the facts as found and in particular the reach of the Coast Guard Family Advocacy Program, I find that the Coast Guard interest in deterring these offenses is not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts.

The judge supplemented these findings later and in so doing said *inter alia*:

4. Crime has an impact. The impact is felt on the victim and on those close to the victim. It is also reflected in the greater society of which the victim and offender are a part. Impact may be direct or indirect. In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service connection. That indirect impact consists of servicemember-parents['] preoccupation with family situation affecting the members['] performance, some initial counselling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J. Good order, discipline, morale and welfare of servicemembers have not been directly impacted. Service reputation has not been adversely affected and those attributes of service reputation in a community which have been testified about, for example, credit worthiness, job stability for spouses, members['] and families['] access to community activities; would not be negatively impacted if these offenses were to come to light.



\* \* \* \*

6. The offenses alleged to have occurred in Alaska are significantly remote in time and place from those alleged to have occurred in New York.

In arriving at his findings, we believe the judge erred in several important respects. First, in finding that there has been no demonstrated impact of the offenses on morale and discipline in Juneau, he failed to properly take into account the changed circumstances resulting from the departure of all directly affected parties before the offenses became known. For the judge to base his decision on the observed effect, or lack thereof, in Juneau after the parties had left, rests the ultimate conclusion of whether jurisdiction is to be exercised on a distorted picture caused by military transfer. A more realistic reflection of the impact from such offenses could have been seen if the offenses had come to light while the accused, the victims and their families were still in Alaska. If impact on the command at Juneau is to be considered at all, it should be viewed from the perspective of the effect such offenses would have had if discovered at the time the fathers and the accused were assigned together on the staff of the District Commander. The offenses by their very nature contained within them the potential for a disrupting effect on good order and discipline on that staff. Accordingly, it was error for the judge to base his assessment of impact on the Juneau command solely on the observed effect after departure of all parties.

A more relevant finding in this area would pertain to the impact of these offenses on morale and discipline at Governors Island, where the accused is now stationed and living on base. The judge made no specific findings, however, with respect to the possible effect of the offenses on morale, good order and discipline within any command at Governors Island or on personnel under

the authority and responsibility of the convening authority, Commander, Third Coast Guard District. Instead, he found the Alaska offenses to be "significantly remote in time and place from those alleged to have occurred in New York" and he concluded that none of the alleged Alaska offenses posed a threat to any military installation nor did they generate an essential military interest in the security of persons on post. Moreover, he found that, "[g]ood order, discipline, morale and welfare of servicemembers have not been directly impacted." With these conclusions, we must disagree. The offenses in Alaska were alleged to have occurred over a period of time up until June 30, 1984. The offenses in New York purportedly commenced as early as November 20, 1984. Characterization of the period between June and November as "significantly remote" is clearly erroneous. To the contrary, the asserted Alaska offenses were close enough in time and nature to those in New York to pose a real threat to the accused's military neighbors with young daughters. As such, they directly impacted upon good order, discipline, morale and welfare of servicemembers and their families. Furthermore, we believe, as a result and as a matter of law, the Coast Guard's interest in deterring these offenses is distinct from and greater than that of the Alaskan authorities and that the judge erred in finding to the contrary.

We also disagree with the judge's conclusion that the concern of the parents in this case "would be the same whether the status of the offender were military or civilian." Such a conclusion overlooked the possible unique and distinct effect from the discovery by the fathers that a fellow Coast Guardsman may have committed violative offenses, of the nature alleged, upon their daughters and the natural expectation of the fathers that those in positions of authority and respon-

sibility within the Coast Guard would take appropriate action to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another.

Finally, the judge's finding that "there has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses" is simply contrary to the evidence of record. Appellate exhibit IX, as indicated earlier, fully reflects that there is more than a potential lessened interest of the civil authorities; it documents an actual lessened interest because of the departure from Alaska of all of the interested parties. That is not to say that the appropriate civil authorities have no interest whatsoever in the case. In fact, through appellate exhibit XV, a stipulation of expected testimony of the assistant District Attorney who signed appellate exhibit IX, it is shown that their decision is subject to reconsideration. There is no assurance, however, that upon reconsideration the Alaskan authorities will decide to prosecute these offenses, even if the judge's dismissal for lack of military jurisdiction is allowed to stand upon final review. Appellate exhibit XV does not change the conclusion to be drawn from the current decision by Alaskan authorities deferring prosecution to the Coast Guard, i.e., the Coast Guard's interest in vindicating its disciplinary authority within its own community in this instance is greater than the interest the civilian prosecutors in Alaska may have in this matter. The judge's reliance on appellate exhibit X for a contrary conclusion is misplaced. That exhibit merely reveals that in two other cases the civil authorities successfully prosecuted Coast Guard members in Alaska State Courts for sexual abuse of minors, without disclosing whether or not the accused and the witnesses were residing in Alaska at the time the offenses became known and without revealing what

other aspects of service connection may or may not have been present. In any event, every case must rest on its own facts. The two prosecutions noted in appellate exhibit X certainly demonstrate that the Alaskan Courts were open and available but that simply does not change the facts with respect to the State's diminished interest in the case presently before this Court. For this reason, we conclude that the judge's finding of fact concerning that interest is clearly erroneous.

For further evaluation of the judge's legal conclusion that there was no "service connection," we look now to the *Relford* criteria enumerated earlier. Viewed from the perspective of the Coast Guard Commander in Juneau, it is clear that factors (a), (c), and (i), would not apply literally to the offenses since these factors relate to base security and offenses committed on a base. On the other hand, factor (a) may apply literally to Commander, Third Coast Guard District's decision to refer all the charges to trial. He has a legitimate, essential and obvious interest in the security of persons on the military enclave at Governors Island, where the accused now lives. Looking strictly at the offenses when they occurred, however, we note that, while the alleged crimes were not committed on or at the boundary of a base, they were violations against persons associated with one particular Coast Guard command. A command is more than a physical place or property; it is an organization of people. The commander's responsibility and authority for maintaining good order within his command relates to people, without regard to the physical attributes and location of the command. Accordingly, if we were to substitute the term "command" for "post" or "base" everywhere that those words appear in the nine *Relford* criteria, other than the quotes from Winthrop in factor (g), and the phrase "associated with a military command" for the phrases "on a military enclave," "on a



military base," and "on the post" in (a), (c), and (i) respectively, it would then appear that all nine *Relford* factors would be relevant to the offenses when they were committed in Juneau. Such a substitution would seem appropriate in light of the unique facts presented here—a military presence without the traditional base—and in light of the language and thrust of the remaining six *Relford* factors, particularly factor (g) with its reference to categories of persons who accompany the military. It is unnecessary to make this substitution, however, which we leave for consideration to other courts and other opinions, because we believe the remaining criteria provide reason enough to conclude that there was service connection in this case as a matter of law.

In light of the earlier quoted statement from *Schlesinger v. Councilman, supra*, we believe this Court is justified in placing overriding importance on *Relford* factors (b) and (e), with their emphasis on the responsibility and authority of a military commander for maintenance of order in the command and the need to have court-martial jurisdiction to support that authority and responsibility when there is the possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern or capacity for vindicating that authority. Here, the officer who convened this court-martial was confronted with allegations of sexual offenses against four minor Coast Guard dependents. The offenses against two of the girls occurred on a base under the authority of Commander, Third Coast Guard District, thereby, bringing into play all of the *Relford* factors that validate his authority to maintain good order, discipline, and morale within his command through the exercise of court-martial jurisdiction. The similarity of the alleged on-base Governors Island offenses and the alleged off-base Juneau offenses, when viewed together, presents a pattern of behavior which

poses a real threat to families now living in close proximity to the offender on-base at Governors Island. That threat and the impact it has upon morale, good order and discipline on the base challenges the responsibility and authority of the military commander for maintenance of order in his command. Thus, we disagree as a matter of law, with the judge's statement that in this case, "No issue challenges the Commander's responsibility and authority to maintain order," as well as the judge's conclusion that the factors presented in this case do not demonstrate "a superior military interest in handling these offenses," and his finding that there was "no direct impact on the service." The military commander in the situation encountered here has a compelling interest in determining as soon as possible whether the accused is guilty or not of *all* the alleged offenses and, if guilty, of ensuring that the proper forum takes appropriate action.<sup>3</sup> The only forum that can try all of these offenses is a court-martial. Alaskan courts have no jurisdiction over the Governors Island offenses. Moreover, the Commander with authority over that base could justifiably conclude that the interest of authorities in Alaska is less than complete with respect to the offenses committed there. Even without a letter so indicating, such a conclusion could be drawn easily enough from the knowledge that the accused and his alleged victims are no longer members of the Alaskan community. The paramount interest of the Coast Guard is clear from the fact that all of the parties were and still

<sup>3</sup> See also RCM 203, MCM, 1984, where in subsection (b) of the discussion pertaining to that rule it is stated that, "where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connection for the off-base offenses."



are members of the Coast Guard community. Commander, Third Coast Guard District, as third ranking officer in the Coast Guard,<sup>4</sup> is in a position to safeguard the overall interests of the Coast Guard in this matter, as well as the unique concerns of his particular command at Governors Island. For all of these reasons, we have concluded as a matter of law that there is "service connection" with its resultant court-martial jurisdiction.

In arriving at this conclusion, we have accepted all facts found by the judge, not directly in conflict with our holding and not expressly rejected as unsupported or erroneous. As noted, however, the judge failed to make findings concerning the impact of the offenses on morale, good order, and discipline at Governors Island. In this regard, we believe that the impact is self evident from the nature of the offenses, the relationships of the parties and the accepted facts of record.

Our ultimate legal conclusion, we reiterate, is based on the following determinative factors: the common thread among all offenses of victims who are young dependent daughters accompanying and residing with their Coast Guard parents; the violative nature of the offenses which invokes the responsibility and authority of the military commander for maintaining security, order, morale and discipline within his command; and the less than complete interest, concern and capacity of civil authorities in vindicating the military commander's responsibility and authority in this regard. These factors impel us to conclude that the offenses are "service connected" and that the judge's ruling dismissing for want of jurisdiction must be reversed.

<sup>4</sup> We judicially note that, Commander, Third Coast Guard District, VADM Paul A. Yost, USCG, is the third senior officer in the Coast Guard, ranking directly after the Commandant and the Vice Commandant of the U.S. Coast Guard.

Having reached this conclusion, the Government's appeal is resolved. In so doing, we have treated certain supplemental findings of fact as validly entered into the record by the judge. The judge, after dismissing the charges and announcing his essential findings of fact in open session at Governors Island, New York, on June 4, 1985 also stated, "Subject to amendment and correction at the time of authentication those should constitute the essential findings of fact on that motion." Later, on June 20, 1985 at Washington, D.C., he signed a document denominated "Supplemental Essential Findings of Fact" and attached it to the record of trial sometime before authenticating the record on June 29, 1985. A copy was then provided to the trial counsel and defense counsel. Appellate Government Counsel challenges this document as not a proper part of the record of trial because it memorializes an invalid act outside a session of court and also that RCM 908, MCM, 1984, precludes further sessions of court with respect to the judge's ruling, after written notice of appeal is filed. In support of its argument that further proceedings were foreclosed, the Government cites *U.S. v. Browers*, 20 MJ 542 (ACMR 1985), a case where the Army Court of Military Review voided a finding of not guilty made by the judge after notice of appeal by the Government had been filed. We do not believe that the supplemental findings of fact in this case rise to the level of prohibited proceedings as found in *Browers*. Furthermore, we see no requirement for presenting the findings in open session as long as all parties are provided copies in a timely fashion. Accordingly, we do not agree with the Government that the supplemental findings in this case are invalid. We do agree, however, that adding such afterthoughts to the record can impede the expeditious filing by the Government of its appeal and brief. That did not happen in this case, as the Government filed its pleadings in a full and

timely manner. In an appropriate case, however, late additional findings of fact may justify granting an enlargement of time for filing of the appeal by the Government, or other appropriate action.

The ruling of the military judge dismissing charges and specifications alleging offenses in Juneau, Alaska is reversed and those offenses are reinstated. The record is returned in order that the trial may proceed with the charges and specifications thus restored, along with the other charges and specifications that were not affected by the judge's ruling.

Judges Burgess, Lynn and Grace concur.

Judge Bridgman concurring in part and dissenting in part.

I agree with the Court's holding that the trial judge erred, as a matter of law, in determining the impact of this offense on the morale and discipline of the Coast Guard in Juneau and that a determination should have been made as to the impact, if any, on the accused's present command and the Coast Guard community as a whole. In addition to the matters discussed in the majority opinion, I note that the judge's essential findings may have been based on an erroneous standard, where the judge stated "the impact of the alleged offenses . . . does not rise to the level to *compel* the exercise of Court-Martial jurisdiction in these circumstances." [R-132] (emphasis added).<sup>1</sup> I also agree that the trial judge erred, as a matter of law, in his finding that there was no evidence suggesting a "lessened interest, concern or capacity" of the civil court in Alaska in the prosecution of these offenses.

<sup>1</sup> This may not accurately reflect the standard applied. In the supplemental essential findings the impact was found "not sufficient to create service connection" [page 2] (emphasis added).

Where I depart from the majority is the holding that there was "service connection" and therefore jurisdiction, in this case, as a matter of law. As noted by the majority, the judge made no specific findings with respect to the possible effect of the offenses at Governors Island or on personnel under the authority and responsibility of the convening authority. Even if this case were before us for review under Article 66(c), UCMJ, 10 USC § 866(c), I would hesitate to determine that jurisdiction exists in light of this omission. Although the Court of Military Appeals has sanctioned drawing reasonable inferences with respect to factual matters not fully developed in the record of trial to support court-martial jurisdiction it has done so where jurisdiction was challenged for the first time at the appellate level. *U.S. v. Lockwood*, 15 MJ 1 (CMA 1983). Since this case is before us for review under Article 62(b) UCMJ, 10 USC § 862(b), I do not believe we are empowered to cure an omission from the essential findings of the trial judge. Further, I would distinguish cases such as *U.S. v. Burris*, 20 MJ 707 (ACMR 1985) and *U.S. v. Poduszcak*, 20 MJ 627 (ACMR 1985), where determination that the trial judge erred, as a matter of law, necessarily compelled a contrary finding of fact.

I am concerned that, in exceeding that which is necessary to dispose of the Government's appeal, we have lessened the requirement "that the Government fulfill its obligation under the law to meet the letter of the law." *U.S. v. Trottier*, 9 MJ 337 (CMA 1980), (concurring opinion at 353). Accordingly, while I would grant relief to the Government and remand the charges to the trial court, I would do so without prejudice to the

accused's right to renew his attack at the trial level and upon any further appellate review of the case. *Murray v. Haldeman*, 16 MJ 74 (CMA 1983).

For the Court

/s/ DONNIE HARRIS  
DONNIE HARRIS  
YN2, U.S. Coast Guard  
Clerk of the Court

## APPENDIX C

### MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984)

R.C.M. 203

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#### DISCUSSION

(a) *In general.* Courts-martial have power to try any offense under the code except when prohibited from doing so by the Constitution. (Jurisdiction over certain offenses and individuals may be affected by Article 3; see R.C.M. 202.) The major constitutional limitation on the subject-matter jurisdiction of courts-martial was established by the Supreme Court of the United States in *O'Callahan v. Parker*, 395 U.S. 258 (1969), which held that an offense under the code may not be tried by court-martial unless it is "service-connected." Later decisions by the Supreme Court, the Court of Military Appeals, and other courts have established standards for applying the service-connection rule, as well as certain exceptions to it. Because each case depends on its own facts, and because these rules are subject to continuing interpretation, careful attention must be paid to service-connection in every case. The remainder of this discussion provides guidance concerning service-connection based on judicial decisions.

(b) *Pleading and proof.* The prosecution should plead the facts establishing jurisdiction (see R.C.M. 307(c)(3). Discussion (F)). If the issue is raised, the prosecution must prove the disputed facts necessary to establish jurisdiction over the offense. See R.C.M. 907(b)(1)(A). Jurisdiction must exist over each offense. The fact that some offenses with which the accused is charged are service-connected does not necessarily establish juris-



diction over others, even if they are of a similar or related nature. However, where related on-base and off-base offenses are involved, there is a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay. The existence of this interest helps provide a basis for finding service-connection for the off-base offenses.

(c) *Determining service-connection.*

(1) *In general.* In *Relford v. Commandant*, 401 U.S. 355 (1971), the Supreme Court identified 12 factors which may be considered in deciding service-connection. The factors are –

1. The serviceman's proper absence from the base.
2. The crime's commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.
6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offenses being among those traditionally prosecuted in civilian courts.

These factors are not exhaustive. The Supreme Court also described nine additional considerations in *Relford*:

- (1) the essential and obvious interest of the military in the security of persons and of property on the military enclave; (2) the responsibility of the

military commander for maintenance of order in the command and the commander's authority to maintain that order; (3) the impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operation and the military mission; (4) Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that person over to the civil authorities; (5) the distinct possibility that civil courts, particularly nonfederal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community; (6) the presence of factors such as geographical and military relationships which have important significance in favor of service-connection; (7) historically, a crime against the person of one associated with the post was subject even to the General Article; (8) the misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law; (9) the inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a servicemember's duty and off-duty activities and hours on the post. In addition, the effect

of the offense on the reputation and morale of the Armed Services is an appropriate consideration in determining service-connection.

The test is not simply a numerical tally of the presence or absence of these or other factors. Instead, the factors identify circumstances which may tend to weigh for or against service-connection, depending on the facts of each case. Thus, certain factors will tend to weigh more heavily than others in given situations. This balancing test has been described by the Supreme Court:

[The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts.

*Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975).

(2) *Military offenses*. Military offenses, such as unauthorized absence, disrespect offenses, and disobedience of superiors, are always service-connected.

(3) *Offenses on a military installation*. Virtually all offenses which occur on a military base, post, or other installation are service-connected. Similarly, offenses aboard a military vessel or aircraft are service-connected. If an essential part of the offense occurs on a military installation, service-connection exists even though the remainder of the offense took place off base. However, on-base preparation to commit an offense or introduction onto a military installation of the fruits or instruments of a crime completed off base may not necessarily be sufficient to prove service-connection over an off-base offense. An offense which directly threatens the security of an installation may be service-connected even though it occurs off base. When an offense is committed near a military installation, the

proximity may support a finding of service-connection, as when it injures relationships between the military and civilian communities and makes it more difficult for servicemembers to receive local support.

(4) *Drug offenses*. Almost every involvement of service personnel with the commerce in drugs, including use, possession, and distribution, is service-connected, regardless of location. However, examples of situations in which drug involvement by a servicemember which after *Relford* analysis might not be service-connected include the use of marijuana by a servicemember on a lengthy leave away from the military, or off-base distribution by a servicemember of a small amount of illegal drugs to a civilian for personal use.

(5) *Offenses involving military status and the flouting of military authority*. The fact that the victim of an offense is a servicemember or that the accused used a military identification card may establish service-connection, especially in conjunction with other facts in a case. If the accused's status, either as a servicemember generally, or as the occupant of a specific position, is of central importance to the criminal activity, as where it is crucial in enabling the accused to commit the crime, service-connection will normally exist. The fact that the accused is an officer or military policeman or was in uniform when the offense was committed does not necessarily establish service-connection, although such circumstances may tend to support a finding of service-connection in conjunction with other facts.

(6) During a declared war, or a period of hostilities as a result of which Congress is unable to meet, virtually all offenses would be service-connected.

(d) *Exceptions to the service-connection requirement*.

(1) *The overseas exception*. Offenses which are committed outside the territorial limits of the United States and its possessions, and which are not subject to trial in



the civilian courts of the United States, need not be service-connected to be tried by court-martial. This exception depends on the location of the commission of the offense, not on the location of the trial. Note that the overseas exception does not apply to all offenses committed abroad, for some criminal statutes of the United States apply to its citizens abroad. The offense must be service-connected in this case because the offense may also be tried in a civilian court of the United States. The fact that the offense occurred overseas may be a factor tending to establish service connection, however, even if potentially subject to trial in Federal civilian court.

(2) *The petty offenses exception.* Petty offenses may be tried by court-martial whether or not they are service-connected. An offense is petty if the maximum confinement which may be adjudged is 6 months or less and no punitive discharge is authorized.

## APPENDIX D

### MANUAL FOR COURTS-MARTIAL, UNITED STATES (1984)

#### ANALYSIS

#### Rule 203. Jurisdiction over the offense

This rule is intended to provide for the maximum possible court-martial jurisdiction over offenses. Since the constitutional limits of subject-matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required. Specific standards derived from current case law are treated in the discussion.

The discussion begins with a brief description of the rule under *O'Callahan v. Parker*, 395 U.S. 258 (1969). It also describes the requirements established in *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977) to plead and prove jurisdiction. See also R.C.M. 907(b)(1)(A). The last three sentences in subsection (b) of the discussion are based on *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). The remainder of the discussion reflects the Working Group's analysis of the application of service-connection as currently construed in judicial decisions. It is not intended as endorsement or criticism of that construction.

Subsection (c) of the discussion lists the *Relford* factors, which are starting points in service-connection analysis, although the nine additional considerations in *Relford* are also significant. These factors are not exhaustive. *United States v. Lockwood*, *supra*. See also *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980).



*Relford* itself establishes the basis for (c)(2) and (c)(3) of the discussion. It has never been seriously contended that purely military offenses are not service-connected per se. See *Relford* factor number 12. Decisions uniformly have held that offenses committed on a military installation are service-connected. See, e.g., *United States v. Hedlund*, *supra*; *United States v. Daniels*, 19 U.S.C.M.A. 529, 42 C.M.R. 131 (1970). See *Relford* factors 2, 3, 10, and 11. As to the third sentence in (c)(3), see *United States v. Seivers*, 8 M.J. 63 (C.M.A. 1979); *United States v. Escobar*, 7 M.J. 197 (C.M.A. 1979); *United States v. Crapo*, 18 U.S.C.M.A. 594, 40 C.M.R. 306 (1969); *Harkcom v. Parker*, 439 F.2d 265 (3d Cir. 1971). With respect to the fourth sentence of (c)(3), see *United States v. Hedlund*, *supra*; *United States v. Riehle*, 18 U.S.C.M.A. 603, 40 C.M.R. 315 (1969). But cf. *United States v. Lockwood*, *supra*. Although much of the reasoning in *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976) has been repudiated by *United States v. Trottier*, *supra*, the holding of *McCarthy* still appears to support the penultimate sentence in (c)(3). See also *United States v. Lockwood*, *supra*; *United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977). The last sentence is based on *United States v. Lockwood*, *supra*.

The discussion of drug offenses in (c)(4) is taken from *United States v. Trottier*, *supra*.

As to (c)(5), the first sentence is based on *United States v. Lockwood*, *supra*. Whether the military status of the victim or the accused's use of a military identification card can independently support service-connection is not established by the holding in *Lockwood*. The second sentence is based on *United States v. Whatley*, 5 M.J. 39 (C.M.A. 1978); *United States v. Moore*, 1 M.J. 448 (C.M.A. 1976). The last sentence is based on *United States v. Conn*, *supra*; *United States v. Borys*, 18 U.S.C.M.A. 547, 40 C.M.R. 259 (1969) (officer status of

accused does not establish service-connection under Article 134) (note: service-connection of Article 133 offenses has not been judicially determined); *United States v. Saulter*, 5 M.J. 281 (C.M.A. 1978); *United States v. Conn*, *supra* (fact that accused was military policeman did not establish service-connection); *United States v. Armes*, 19 U.S.C.M.A. 15, 41 C.M.R. 15 (1969) (wearing uniform during commission of offense does not establish service-connection).

Subsection (c)(6) of the discussion indicates that virtually all offenses by servicemembers in time of declared war are service-connected. There is little case authority on this point. The issue was apparently not addressed during the conflict in Vietnam; of course, the overseas exception provided jurisdiction over offenses committed in the theater of hostilities. The emphasis in *O'Callahan* on the fact that the offenses occurred in peacetime (see *Relford* factor number 5) strongly suggests a different balance in time of war. Furthermore, in *Warner v. Flemings*, a companion case decided with *Gosa v. Mayden*, 413 U.S. 665 (1973), Justice Douglas and Stewart concurred in the result in upholding *Flemings'* court-martial conviction for stealing an automobile while off post and absent without authority in 1944, on grounds that such an offense, during a congressionally declared war, is service-connected. The other Justices did not reach this question. Assigning *Relford* factor number 5 such extensive, indeed controlling, weight during time of declared war is appropriate in view of the need for broad and clear jurisdictional lines in such a period.

Subsection (d) of the discussion lists recognized exceptions to the service-connection requirement. The overseas exception was first recognized in *United States v. Weinstein*, 19 U.S.C.M.A. 29, 41 C.M.R. 29 (1969). See also *United States v. Keaton*, 19 U.S.C.M.A. 64, 41

C.M.R. 64 (1969). The overseas exception flows from *O'Callahan's* basic premise: that the service-connection requirement is necessary to protect the constitutional right of service members to indictment by grand jury and trial by jury. While this premise might not be evident from a reading of *O'Callahan* alone, the Supreme Court subsequently confirmed that this was the basis of the *O'Callahan* rule. See *Gosa v. Mayden*, *supra* at 677. Since normally no civilian court in which the accused would have those rights is available in the foreign setting, the service-connection limitation does not apply.

The situs of the offense, not the trial, determines whether the exception may apply. *United States v. Newvine*, 23 U.S.C.M.A. 208, 48 C.M.R. 960 (1974); *United States v. Bowers*, 47 C.M.R. 516 (A.C.M.R. 1973). The last sentence in the discussion of the overseas exception is based on *United States v. Black*, 1 M.J. 340 (C.M.A. 1976). See also *United States v. Gladue*, 4 M.J. 1 (C.M.A. 1977); *United States v. Lazzaro*, 2 M.J. 76 (C.M.A. 1976). Some Federal courts have suggested that the existence of court-martial jurisdiction over an overseas offense does not depend solely on the fact that the offense is not cognizable in the United States civilian courts. See *Hemphill v. Moseley*, 443 F.2d 322 (10th Cir. 1971). See also *United States v. King*, 6 M.J. 553 (A.C.M.R. 1978), *pet. denied*, 6 M.J. 290 (1979).

Several Federal courts which have addressed this issue have also held that the foreign situs of a trial is sufficient to support court-martial jurisdiction, although the rationale for this result has not been uniform. See, e.g., *Williams v. Froehlke*, 490 F.2d 998 (2d Cir. 1974); *Wimberly v. Laird*, 472 F.2d 923 (7th Cir.), *cert. denied*, 413 U.S. 921 (1973); *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl.), *cert. denied*, 400 U.S. 849 (1970); *Bell v. Clark*, 308 F.Supp. 384 (E.D. Va. 1970), *aff'd*,

437 F.2d 200 (4th Cir. 1971). As several of these decisions recognize, the foreign situs of an offense is a factor weighing heavily in favor of service-connection even without an exception for overseas offenses. See *Relford* factors 4 and 8. The logistical difficulties, the disruptive effect on military activities, the delays in disposing of offenses, and the need for an armed force in a foreign country to control its own members all militate toward service-connection for offenses committed abroad. Another consideration, often cited by the courts, is the likelihood that if the service-connection rule were applied overseas as it is in the United States, the practical effect would be far more frequent exercise of jurisdiction by host nations, thus depriving the individual of constitutional protections the rule is designed to protect.

The petty offenses exception rests on a similar doctrinal foundation as the overseas exception. Because there is no constitutional right to indictment by grand jury or trial by jury for petty offenses (see *Baldwin v. New York*, 399 U.S. 66 (1970); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Duke v. United States*, 301 U.S. 492 (1937)), the service-connection requirement does not apply to them. *United States v. Sharkey*, 19 U.S.C.M.A. 26, 41 C.M.R. 26 (1969). Under *Baldwin v. New York*, *supra*, a petty offense is one in which the maximum sentence is six months confinement or less. Any time a punitive discharge is included in the maximum punishment, the offense is not petty. See *United States v. Smith*, 9 M.J. 359, 360 n. 1 (C.M.A. 1980); *United States v. Brown*, 13 U.S.C.M.A. 333, 32 C.M.R. 333 (1962).

*Sharkey* relied on the maximum punishment under the table of maximum punishments in determining whether an offense is petty. It is the view of the Working Group that offenses tried by summary courts-martial and special courts-martial at which no punitive



discharge may be adjudged are "petty offenses" for purposes of *O'Callahan* in view of the jurisdictional limitations of such courts. Whether the jurisdictional limits of a summary or such special court-martial makes an offense referred to such a court-martial petty has not been judicially determined.

## APPENDIX E

### RECORD OF TRIAL PAGES 129 to 133

The 39(a) Session was called to order at 1120 hours, 4 June 1985.

MJ: This Article 39(a) Session will come to order, please be seated.

TC: Your honor, all parties who were present when the Article 39(a) Session last recessed are again present, no party required to be present is absent, there are no witnesses or members present.

MJ: I am going to grant the defense motion to dismiss the Alaska offenses. I'll make certain comments in support of that ruling. First, I will compliment counsel for their excellent briefs and arguments in laying out the issues on that matter.

I. The considerations; Constitutional; Supreme Court decisions in *O'Callaghan*, *Relford*, *Sehlesinger*, the provisions Rule for Court Martial 203 and its discussion and its analysis; The Court of Military Appeals decisions were all cited. Certainly the earlier cases, very closely on point, as Government pointed out many of them dated in 1969 and presumably back-logged on the docket at the time of the *O'Callaghan* decision, up to and through *Lockwood* and even more recently *Johnson* and other cases and numerous Court of Military Review cases that were cited and argued. Pendant jurisdiction was found to be not applicable to establish jurisdiction in this case though I have considered it, especially in light of *Lockwood*. I have applied a preponderance of the evidence standard with the Government having the burden of persuasion.

II. In simple terms my finding is that the Government hasn't met its burden. I certainly recognize a continuing evolution of the concept of subject matter jurisdiction in military jurisprudence. Nevertheless, I



recognize what the law is and am not necessarily applying where it may be going.

III. I adopt as essential findings of fact the stipulation of fact for the jurisdictional motion which has been entered into by the parties in this case.

With respect to the *Relford* factors:

- I find that the accused was properly absent from his unit at the time of each of the alleged offenses.

- Each offense was alleged to have occurred away from any military base at the accused's residence in the civilian community.

- Each offense was alleged to have occurred in a place not under military control.

- Each offense was alleged to have occurred within the territorial limits of the United States.

- None of the offenses was alleged to have been committed during time of war and all offenses were unrelated to authority stemming from the war power.

- The accused did not use his military position to commit any of the alleged offenses, nor did he commit any of the alleged offenses while performing his military duties. In short, there was no connection between the accused's military duties and the alleged offenses.

- The victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses.

- Civilian courts are present and available to adjudicate the offenses. While the State of Alaska has presently deferred prosecution in light of this proceeding, the State has not waived prosecution, nor declined to prosecute.

- Accused was not in uniform and in no way flouted military authority at the time of the alleged offenses.

- None of the alleged offenses posed a threat to any military installation. None of the alleged offenses resulted in any violation of military property.

- All of the alleged offenses are of the type traditionally prosecuted by civilian courts and are specifically of the type the Coast Guard has recently consented to have civilian courts prosecute Coast Guard members for in Alaska.

With respect to those so-called "additional *Relford* factors":

- There is no essential interest of the military in the security of person or property on post in this case.

- No issue challenges the Commander's responsibility and authority to maintain order.

- There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personal assigned there, nor on military operations or missions. The impact apparent in this case, that is, on the parents and the victims themselves is no different than that which would be produced by civilian perpetrator.

- There has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses. To the contrary, Appellate Exhibit X suggests that civil courts in Alaska have recently produced results highly satisfactory to the military in similar cases.

—The Constitutional authority of Congress to authorize Court-Martial trials for other than purely military offenses is recognized and respected, as are the precedents of higher level courts.

—The particular geographic situation in Juneau with access restricted to sea and air is not unlike that of Hawaii at the time of the offense in *O'Callaghan*, and the population of the Coast Guard in Juneau in relation to the population at large did not create a relationship of a pseudo-military camp or instillation. The fortuitous selection of Coast Guard member's housing in relative proximity to one another in the Mendenhall Valley likewise did not create any relationship between civilians and the military, calling for the exercise of military jurisdiction for the offenses allegedly committed there. Here we do not have a case of inability to distinguish the military from the non-military area of a post or between the accused's on duty versus off-duty time while on post. These alleged offenses are off duty and off post.

—The historical fact that Court-Martial jurisdiction has been exercised over offenses which victimized the persons of someone associated with the military is recognized, as is the fact that *O'Callaghan* and other precedents did not intend to limit Courts-Martial to purely military offenses.

The offenses charged are not purely military offenses. There was a *de minimus* military relationship between the accused and the military fathers of the victims. Those relationships were founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships. There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. As to the effect of the alleged incidents toward

the Coast Guard within the civilian community, there has been speculation by military personnel, but little more. No unfavorable publicity in the Juneau Empire or otherwise has been introduced into evidence. There is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles. I find no adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents. The on-base association between the accused and the alleged victims was minimal and did not provide the accused with the opportunity to commit the acts giving rise to the charged misconduct. The occupancy by military personnel and their families of homes in the Mendenhall Valley area of the City of Juneau, Alaska, including several military families living within close proximity to each other, did not convert that area into a military base or property otherwise under military control. The fact that several military members purchased homes in proximity to one another did not bring these offenses within the "at or near" meaning of a military base or otherwise make them on base. I acknowledge a certain amount of logic in the judicial economy argument put forth by the Government and that political or economic considerations may support exercise by this court of jurisdiction. However, those factors along with all others have not demonstrated a superior military interest in handling these offenses. The allowances paid by the military and authorized by Congress for military personnel in Juneau, Alaska to live off base do not support the exercise of Court-Martial jurisdiction for offenses allegedly committed in the residential area of the civilian community by military members, but tend to support a conscious choice not to create military enclaves with a recognition of the authority of civil authorities to exercise jurisdiction in those areas. Again Appellate Exhibit X provides support in this regard. The impact of the



alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of Court-Martial jurisdiction in these circumstances. In this regard, I note the increased caution of the parents victims may now exercise over their children, the requirements for counseling, anxiety, and time away from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. There has been no impact on transfer of military personnel within the meaning of the Personnel Manual provisions which have been taken judicial notice of. There have been transfers of all involved parties without restrictions.

With respect to the Coast Guard Advocacy Program, I find that Commandant Instruction 1750.3 as supported by the testimony of Captain Caprio, who was a participant in the founding of that policy specifically excludes the situation at present from its definition of child abuse. As defined in that instruction child abuse relates solely to intra-family type relationships and family there is defined not to include its broader definition of the Coast Guard family. The instruction specifies and in enclosure three that local laws shall govern and adopts the requirements to report in accordance with local laws and mentions that local jurisdiction shall control. Paragraph 4f states a policy to relinquish federal jurisdiction and specifies in paragraph 4d that the court action of local authority shall be considered separate and distinct. Those same considerations that I have focused on from the Family Advocacy Program instruction are reflected in the other document taken Judicial Notice of the pamphlet Charting Your Life in

the Coast Guard primarily those on page 113 and thereabouts where many of the provisions of the instruction are just repeated. In light of the facts as found and in particular the reach of the Coast Guard Family Advocacy Program, I find that the Coast Guard interest in deterring these offenses is not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts.

MJ: Subject to amendment and correction at the time of authentication those should constitute the essential findings of fact on that motion. Is the defense ready to proceed with other motions?



## APPENDIX F

### GENERAL COURT-MARTIAL UNITED STATES COAST GUARD

UNITED STATES

*v.*

RICHARD SOLARIO  
549 04 2211  
Yeoman First Class, E-6  
U.S. Coast Guard

#### SUPPLEMENTAL ESSENTIAL FINDINGS OF FACT

1. Having reviewed the record of trial, and prior to authentication, I hereby supplement my essential findings of fact made on 4 June 1985 with the following additional essential findings of fact.

2. To the extent that trust had a bearing on the opportunity for the alleged offenses, that trust arose out of friendships between the Solorio and Johnson and Solorio and Grantz families and not out of the respective fathers common association as members of the U.S. Coast Guard. The trust placed in a servicemember in general, and in the accused in particular, by virtue of status as a member of the Coast Guard was minimal and had no direct relationship to the offenses alleged.

3. No on base associations or contacts led to or had any connection with the alleged offenses.

4. Crime has an impact. The impact is felt on the victim and on those close to the victim. It is also reflected in the greater society of which the victim and offender are a part. Impact may be direct or indirect. In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service connection.

(62a)

63a

That indirect impact consists of servicemember-parents preoccupation with family situation affecting the members performance, some initial counselling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J. Good order, discipline, morale and welfare of servicemembers have not been directly impacted. Service reputation has not been adversely affected and those attributes of service reputation in a community which have been testified about, for example, credit worthiness, job stability for spouses, members and families access to community activities; would not be negatively impacted if these offenses were to come to light.

5. If the alleged Alaska offenses were to be made public, the future reputation of the Coast Guard in the community of Juneau will be affected only slightly in view of the solid reputation the service enjoys in that community. That reputation would be further enhanced if the alleged military offender were promptly turned over to local authorities for prosecution.

6. The offenses alleged to have occurred in Alaska are significantly remote in time and place from those alleged to have occurred in New York.

Done at Washington, DC  
This 20th day of June 1985

/s/ PAUL M. BLAYNEY  
Paul M. Blayney  
Commander, U.S. Coast Guard  
Military Judge

Original: Record of Trial  
Copy: Trial Counsel, LCDR F. Couper, USCG  
Detailed Defense Counsel, LT A. Hochberg,  
USCGR

5

No. 85-1581

Supreme Court, U.S.

FILED

MAY 27 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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RICHARD SOLORIO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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30pp

## QUESTIONS PRESENTED

1. Whether certain offenses charged against petitioner—the sexual assault of the dependent children of fellow servicemen who were assigned to the same military command as petitioner—had a sufficient connection with the military to empower a court-martial to try him for those offenses.

2. Whether the military and civilian prohibitions against the sexual abuse of children gave petitioner sufficient notice that the conduct charged against him was criminal.



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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

No. 85-1581

RICHARD SOLORIO, PETITIONER

*v.*

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Military Appeals (Pet. App. 1a-17a) is reported at 21 M.J. 251. The opinion of the United States Coast Guard Court of Military Review (Pet. App. 18a-42a) is reported at 21 M.J. 512.

JURISDICTION

The judgment of the United States Court of Military Appeals was entered on January 27, 1986. The petition for a writ of certiorari was filed on March 26, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

(1)

## STATEMENT

A general court-martial was convened by the Commander of the Third Coast Guard District in Governors Island, New York, to try petitioner for 21 specifications charging him with various acts of sexual child abuse, in violation of Articles 80, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 928, and 934. At a pre-trial hearing, the military judge granted petitioner's motion to dismiss 14 of the specifications for lack of jurisdiction (Pet. App. 3a-4a, 55a-61a). Pursuant to Article 62, UCMJ, 10 U.S.C. (Supp. II) 862, the government appealed that ruling to the United States Coast Guard Court of Military Review, which reversed the trial judge's ruling and reinstated the specifications (Pet. App. 18a-42a). Petitioner thereafter sought review by the United States Court of Military Appeals, which granted review and affirmed the decision of the Coast Guard Court of Military Review (Pet. App. 1a-17a). After both the Court of Military Appeals and the Chief Justice denied petitioner's request for a stay of the proceedings, the court-martial reconvened on February 18, 1986. On March 11, 1986, petitioner was convicted on eight of the 14 specifications involved in the interlocutory appeal, as well as on four other specifications of sexual child abuse. He was sentenced two days later to confinement at hard labor for 12 months, to a reduction in pay-grade, and to a bad conduct discharge.

1. From 1982 to 1984, petitioner was stationed in the Seventeenth Coast Guard District in Juneau, Alaska, and served as a member of the Commander's staff (Pet. App. 20a). The number of Coast Guard personnel stationed in Juneau is far less than the

number of military personnel found at typical installations of other services, and there is no "base" or "enclave" where Coast Guard personnel live and work. Except for a small facility that could house a small number of officers and enlisted personnel,<sup>1</sup> there are no living quarters for Coast Guard personnel in Juneau, and virtually all Coast Guard military personnel in Juneau live in the civilian community (*id.* at 20a-21a n.1).

The offenses that were the subject of the motion to dismiss all occurred in petitioner's privately owned home in Juneau between March 1982 and June 1984 (Pet. App. 20a). The victims were two young girls, between ten and 12 years of age at the time the offenses occurred. The fathers of the girls are active duty members of the Coast Guard. At the time of the offenses, the girls' fathers were also assigned to the Seventeenth District and worked in the same building as petitioner. *Id.* at 10a, 20a; Tr. 43-44, 60-61. The victims' families lived in civilian housing, one next door to petitioner, another one-half mile away (Pet. App. 20a). The two victims frequently visited petitioner's house (*id.* at 21a; Tr. 46-47). During their visits, petitioner committed numerous acts of sexual abuse, including fondling, indecent assault, and several attempted rapes of one of the victims. This pattern of abuse continued over a two-year period until petitioner was transferred by the Coast Guard from Alaska to its base at Governors Island, New York (Pet. App. 14a, 21a-22a; see also Tr. 9 (addendum)).

---

<sup>1</sup> There is a small facility that has a pier for a Coast Guard buoy tender that can house six officers and 49 enlisted personnel (Pet. App. 20a-21a n.1).



Following petitioner's transfer to New York, he sexually abused the young daughters of two other fellow Coast Guardsmen (Pet. App. 22a, 36a-38a; Tr. 9 (addendum)).<sup>2</sup> During the investigation of those on-base offenses in New York, the crimes in Alaska first came to light (Pet. App. 21a). The State of Alaska was contacted concerning its interest in prosecuting the offenses that occurred there. The District Attorney's Office in Juneau responded that it would defer prosecution in favor of the Coast Guard (App., *infra*, 3a).<sup>3</sup> Petitioner was ultimately charged with various offenses that were alleged to have occurred in both Alaska and New York.

2. a. Before trial, petitioner moved to dismiss the Alaska-based specifications on the ground that the court lacked jurisdiction over those offenses under *Relford v. Commandant*, 401 U.S. 355 (1971), and *O'Callahan v. Parker*, 395 U.S. 258 (1969). At a session of the court-martial on June 3 and 4, 1985, the military judge conducted an evidentiary hearing on the motion. Evidence was introduced at the hearing on the effect of the crimes on the young girls who were abused (Pet. App. 10a; Tr. 52, 59, 63, 65). In addition, the victims' fathers testified as to the emotional impact of the crimes on them personally. As a result of the crimes, the evidence showed that the duty performance of these otherwise superior servicemen suffered (Pet. App. 10a-11a; Tr. 48, 50, 64, 65, 66-67). One father testified that the experience was far more devastating than the 13 months that

<sup>2</sup> These incidents provided the basis for petitioner's convictions for the on-base offenses.

<sup>3</sup> The letter from the Alaska District Attorney's office was introduced as an exhibit in the lower courts (Pet. App. 34a) and is reprinted as an appendix to this brief (App., *infra*, 1a-4a).

he spent as a combat soldier in Vietnam (Tr. 66-67). The evidence demonstrated that the fathers could not work in the same unit with the accused again (Pet. App. 11a; Tr. 49, 66). The testimony concerning the emotional effect on the victims and their families was also supported by expert opinion (Tr. 75-78). As a result of the offenses, both the victims and their servicemen parents required extensive psychological counseling (Pet. App. 10a, 22a; Tr. 48, 49, 52, 63, 64-65). Evidence was also adduced that public awareness of such crimes would damage the reputation of the Coast Guard in the civilian community, at least in the short run, risking the loss of credit and job opportunities presently enjoyed by Coast Guard personnel stationed in Juneau (Tr. 22-23, 34, 36, 37-39).

b. After hearing the evidence, the military judge granted the motion to dismiss the Alaska specifications and announced his findings on the matter (Pet. App. 55a-61a). Concluding that none of the factors identified in *Relford v. Commandant*, *supra*, supported the exercise of court-martial jurisdiction over the Alaska child abuse offenses, the trial judge dismissed those charges (Pet. App. 61a-63a).

3. On the government's appeal, the Coast Guard Court of Military Review reversed the military judge's ruling and reinstated the Alaska charges (Pet. App. 18a-42a). In its decision, the court of military review found that several of the trial judge's findings were unsupported by the evidence and clearly erroneous as a matter of law (*id.* at 28a-35a).<sup>4</sup> The court concluded that "[t]he offenses

<sup>4</sup> Petitioner often refers to the trial judge's findings (Pet. 4, 6-7, 9-10), but he fails to recognize that the court of military review found that several of those findings were incorrect as a matter of law (Pet. App. 32a-35a).

by their very nature contained within them the potential for a disrupting effect on good order and discipline" (*id.* at 32a) and that the offenses "directly impacted upon good order, discipline, morale and welfare of servicemembers and their families" (*id.* at 33a). The court held that "as a matter of law, the Coast Guard's interest in deterring these offenses is distinct from and greater than that of the Alaskan authorities and that the judge erred in finding to the contrary" (*ibid.*). The court also found that the trial judge had "overlooked the possible unique and distinct effect" on the military of its inability to prosecute a serviceman for the type of offenses with which petitioner was charged (*id.* at 33a-34a). Likewise, relying on the letter of the Alaska assistant district attorney, which stated that Alaska would defer prosecution of petitioner in favor of the Coast Guard, the court found clear evidence of the civilian authorities' lessened interest and ability to vindicate the military's disciplinary interests (*id.* at 34a).

The court then turned to the legal question whether there was a sufficient connection between the Alaska offenses and the interests of the military to support court-martial jurisdiction under the criteria listed in *Relford v. Commandant*, *supra*. Examining the charged offenses, the court found that, although the offenses were not committed within the confines of a military "base," they were nonetheless "violations against persons associated with one particular Coast Guard command" (Pet. App. 35a). A single Coast Guard command, the court explained, "is more than a physical place or property; it is an organization of people," for whose security the commander is responsible (*ibid.*). It was appropriate for the military to be concerned with the security of its "com-

mand," rather than simply a particular "base," the court concluded, "in light of the unique facts presented here—a military presence without the traditional base" (*id.* at 36a). If the facts of this case were analyzed in that manner, the court concluded, all of the factors listed in *Relford* would support the exercise of court-martial jurisdiction (*id.* at 35a-36a).

The court found it unnecessary to analyze the case in that fashion, however, because it held that two of the *Relford* factors supported the exercise of court-martial jurisdiction in this case: "the responsibility and authority of a military commander for maintenance of order in the command and the need to have court-martial jurisdiction to support that authority and responsibility when there is the possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern or capacity for vindicating that authority" (Pet. App. 36a-38a; see *Relford*, 401 U.S. at 367-368). In so ruling, the court emphasized that the similarity between the Alaska and New York sexual offenses "presents a pattern of behavior which poses a real threat to families" in the vicinity of the New York Coast Guard facility (Pet. App. 36a-37a), that the commander of the Coast Guard's New York facility had a "compelling" interest in resolving all of the charges against petitioner swiftly (*id.* at 37a), and that the "paramount interest of the Coast Guard" was evidenced by the fact that all of the parties were still members of "the Coast Guard community" (*id.* at 37a-38a). Accordingly, the court held that the Alaska child abuse charges were "service connected" within the meaning of *Relford*, *O'Callahan*, and *Schlesinger v. Councilman*, 420 U.S. 738 (1975).



4. Petitioner thereafter sought review by the Court of Military Appeals. After granting review, that court also found that the Alaska offenses were within the jurisdiction of a military court-martial (Pet. App. 1a-17a). The Court of Military Appeals noted that not every off-base offense against a service-member's dependent can be prosecuted by a court-martial (*id.* at 12a), but it found that "sex offenses against young children \* \* \* have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned" (*ibid.*). In ruling that these offenses could be tried by a court-martial, the court of appeals relied on a number of factors (*id.* at 10a-16a): the emotional and financial impact on the parents—especially the servicemember fathers—and the victims; the effect on the morale and discipline of the military unit, both where the parties were stationed when the offenses occurred, and where the parties might thereafter serve; the lessened interest of civilian authorities in prosecution due to the military transfers of the victims and the accused away from Alaska; and the benefits to petitioner, the victims, and the Coast Guard from trying the similar off-base (Alaska) and on-base (New York) offenses together. Considering these factors in light of *O'Callahan* and *Relford*, the court of appeals concluded that petitioner could be tried by a court-martial on the Alaska child abuse offenses (*id.* at 16a).

## ARGUMENT

The decision of the Court of Military Appeals is correct, it does not conflict with any decision of this Court, and it involves a jurisdictional issue that has no impact beyond the military justice system. Furthermore, petitioner's contentions are not ripe for this Court's review: petitioner's convictions have not yet been reviewed on direct appeal, and one of the questions in the petition was not raised in any of the lower courts. For these reasons, review by this Court is not warranted.

1. This case is currently in an interlocutory posture. The Court of Military Appeals rendered its decision on a government appeal from the trial judge's dismissal of the charges against petitioner. Following that court's decision, petitioner was convicted and sentenced. Petitioner's sentence includes a term of confinement in excess of six months and a bad conduct discharge. If that sentence is upheld by the convening authority (see Art. 60, UCMJ, 10 U.S.C. (& Supp. II) 860), petitioner's convictions and sentence will be reviewed by the Coast Guard Court of Military Review under Article 66 of the UCMJ, 10 U.S.C. (& Supp. II) 866. If that court rules against him, petitioner will again be able to seek review by the Court of Military Appeals under Article 67 of the UCMJ, 10 U.S.C. (& Supp. II) 867. Because a favorable decision by either court below on petitioner's pending appeal may render moot the claims that he has raised in his petition, review by this Court at this time would be premature.

The record on petitioner's appeal from the judgment of conviction also provides a more complete factual background against which to consider the



claims presented in the petition. Contrary to petitioner's assertion (Pet. 20), the trial on the merits has produced additional facts that are relevant to the issue of jurisdiction.<sup>5</sup> Accordingly, on petitioner's upcoming appeal, the Court of Military Review will be able to apply its expertise to the more complete factual record of the case, so as to present a better record for subsequent review. See *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975) (noting that whether an offense is subject to prosecution by court-martial is a "matter[] as to which the expertise of military courts is singularly relevant"); see also *id.* at 760-761 n.34. There is therefore no need for this Court to decide the claims presented by petitioner in the current posture of this case.

Petitioner maintains (Pet. 19) that review by this Court is necessary at this time because a service-member defendant may petition for a writ of certiorari only from a judgment of the Court of Military Appeals. Petitioner contends that his opportunity to seek review by this Court will be frustrated if the Court of Military Appeals declines to review his case again. That claim, however, is not persuasive.

When Congress gave this Court certiorari jurisdiction in military cases, it gave the Court jurisdiction to review only the judgments of the Court of Military Appeals, and not the courts of military re-

<sup>5</sup> We are informed that, for example, additional evidence of the impact of the offenses on the victims' families, which the Court of Military Appeals considered significant (Pet. App. 10a-12a), was developed during the trial testimony of the victims' mothers, who did not appear at the pretrial hearing. It was also revealed during the trial that one of the victims had considered suicide.

view. Congress restricted this Court's jurisdiction in that fashion to ensure that the cases coming to this Court would be only those involving issues of substantial national importance. See S. Rep. 98-53, 98th Cong., 1st Sess. 8-11, 33-34 (1983); H.R. Rep. 98-549, 98th Cong., 1st Sess. 16-17 (1983). If the Court of Military Appeals were to decline to review petitioner's case following the affirmance of his conviction, it would put petitioner in precisely the same position as if the court of military review had ruled against him in the first instance and the Court of Military Appeals had declined to review that ruling. The fact that the Court of Military Appeals has a screening function that is designed to limit the number of military cases reaching this Court should not provide a justification for relaxing the usual principles counseling against review of interlocutory decisions.

In any event, the Court of Military Appeals has been sensitive to the fact that it must grant review before a defendant may seek review in this Court. Consistent with congressional concern as to the role that it plays in the process (S. Rep. 98-53, *supra*, at 34), the Court of Military Appeals has in some cases granted review and summarily affirmed on the basis of its own longstanding precedents that have never been reviewed by this Court, apparently in order to allow the defendant to seek review in this Court. See, e.g., *United States v. Spicer*, 20 M.J. 188 (1985), cert. denied, No. 84-1978 (Oct. 21, 1985); *United States v. Simmons*, 21 M.J. 38 (1985), cert. denied, No. 85-857 (Feb. 24, 1986); *United States v. Holman*, 21 M.J. 149 (1985), cert. denied, No. 85-963 (Jan. 13, 1986).

Moreover, the decision by the Court of Military Appeals not to review petitioner's case would not

prevent him from obtaining review of his claims by a federal court. Petitioner can collaterally attack his convictions by filing a petition for a writ of habeas corpus in federal district court, as Congress recognized when it limited direct review in this Court from the judgments of the military courts. See S. Rep. 98-53, *supra*, at 32-33.

2. On the merits, petitioner's claims do not warrant further review. The courts below correctly applied this Court's decisions to the facts of this case, and petitioner has not presented any sufficient reason to justify further review.

The Constitution (Art. I, § 8, Cl. 14) empowers Congress to provide for the court-martial of servicemen for committing crimes. Whether an individual serviceman may be tried by a court-martial for a particular crime turns on whether, on the facts of the case, the offense and the underlying conduct sufficiently affect the interests of the military as to be "service-connected." *Councilman*, 420 U.S. at 760; *Relford v. Commandant*, 401 U.S. 355, 365-369 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969). That inquiry requires a court to gauge "the impact of an offense on military discipline and effectiveness, \* \* \* whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and \* \* \* whether the distinct military interest can be vindicated adequately in civilian courts." *Councilman*, 420 U.S. at 760. This undertaking involves "matters of judgment that often turn on the precise set of facts in which the offense has occurred," as to which "the expertise of military courts is singularly relevant" (*ibid.*). See also *Relford*, 401 U.S. at 365-366 (adopting "an *ad hoc* approach to cases where a trial by court-martial is chal-

lenged"). The ruling below that petitioner can be tried by a court-martial is consistent with these principles.

*Relford* held that a serviceman may be court-martialed for a crime committed within the confines of a military post that violates the security of a person or property. 401 U.S. at 369. See also *United States v. Smith*, 18 C.M.A. 609, 40 C.M.R. 321 (1969) (the sexual abuse of a minor may be prosecuted by a court-martial where that crime occurs within the confines of a military base). As the court of military review noted (Pet. App. 36a), however, this case is "unique" because there is no military base in Alaska for Coast Guard personnel or their families, even though the commander of that Coast Guard district has the same responsibility for their welfare that he would have if they lived on a military base. Thus, as the court of military review explained (*id.* at 35a-36a), it is reasonable to treat offenses committed against Coast Guard servicemen and their dependents in Juneau as if they were committed on a military base. The contrary result would unreasonably restrict the ability of the Juneau Coast Guard commander to protect military personnel and their dependents from offenses committed by servicemen. Because it is immaterial in the unusual circumstances of this case that the child abuse offenses charged against petitioner occurred in his home rather than on a military enclave, the lower courts' rulings are fully consistent with this Court's decision in *Relford*.

The lower courts were also correct in holding that the military's interest in "discipline and effectiveness" warranted the exercise of court-martial jurisdiction in this case (*Councilman*, 420 U.S. at 760).



In so ruling, the lower courts stressed several of the factors identified in *Relford*. One concern was that both victims of petitioner's sexual assaults were dependent children of fellow servicemen who were assigned to the same command as petitioner (Pet. App. 12a, 16a, 38a). See *Relford*, 401 U.S. at 366. The military has an obvious and substantial interest in being able to bring criminal charges against a serviceman for sexually abusing military dependents. This need is particularly evident in a service like the Coast Guard, which has crews who will be on missions at sea for extended periods, and whose officers and enlisted personnel must feel secure about the safety of their families in order to carry out their responsibilities while away from home. The Court of Military Appeals' conclusion about the adverse effects of this kind of crime on morale and discipline reflects precisely the type of expertise that this Court has stated is "singularly relevant" in determining whether a particular crime may be subject to court-martial jurisdiction. *Councilman*, 420 U.S. at 760. Cf. *Goldman v. Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 4-5; *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981); *Middendorf v. Henry*, 425 U.S. 25, 43 (1976); *Burns v. Wilson*, 346 U.S. 137, 140-142 (1953).<sup>6</sup>

<sup>6</sup> Petitioner criticizes (Pet. 15) the Court of Military Appeals' conclusion that the sexual child abuse charges against petitioner were likely to have an adverse effect on morale, on the ground that there was no support in the record for this conclusion. The Court of Military Appeals' conclusion, however, is eminently reasonable. Cf. *New York v. Ferber*, 458 U.S. 747, 756-760 (1982); see also *Chappell v. Wallace*, 462 U.S. 296, 302 (1983) ("[t]he complex, subtle, and professional decisions as to the composition, training, equipping, and

Additionally, the Alaska child abuse charges filed against petitioner did not stand alone. Petitioner was also charged with committing similar offenses against other military dependents on the Coast Guard base at Governors Island, New York (Pet. App. 3a), and those offenses were unquestionably subject to court-martial jurisdiction. See *Relford v. Commandant*, *supra*; *United States v. Smith*, *supra*. Accordingly, the Alaska charges were not isolated instances of misconduct; rather, the Alaska and New York child abuse offenses, "when viewed together, presents a pattern of behavior which poses a real threat to families now living in close proximity to the offender on-base at Governors Island" (Pet. App. 36a-37a) and "probably result[ed] from the same underlying motive or predisposition" (*id.* at 16a). Under these circumstances, the Coast Guard had a substantial interest in resolving all the charges in one proceeding, for a variety of reasons: (1) to allow petitioner to return to his assigned duties if he were exonerated, (2) to enhance the possibility of rehabilitation if he were convicted, (3) to enable the Governors Island Coast Guard commander to maintain order within his command, (4) to avert the disruptive effect of successive prosecutions on the ability of the servicemen fathers to carry out their military responsibilities, and (5) to lessen the need for the minor victims and their servicemen fathers to relive "a humiliating and degrading experience" (*id.* at 15a-16a, 36a-38a). See *Relford*, 401 U.S.

control of a military force are essentially professional military judgments'") (quoting *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973)); *Goldman*, slip op. 6.

<sup>7</sup> *Morris v. Slappy*, 461 U.S. 1, 14 (1983).



at 367; see also *United States v. Lockwood*, 15 M.J. 1, 8 (C.M.A. 1983) (the presence of similar offenses that are clearly subject to the jurisdiction of a court-martial may be considered in determining whether other offenses may be tried by a court-martial).

Finally, the Court of Military Appeals found that the Alaska officials had a reduced interest in prosecuting petitioner (Pet. App. 14a, 16a). See *Councilman*, 420 U.S. at 760; *Relford*, 401 U.S. at 367-368. Neither petitioner nor his victims are now residents of that state, and the state prosecutors have decided to defer prosecution of petitioner to the military (Pet. App. 37a-38a; see also App., *infra*, 3a). This factor also lends support to the Court of Military Appeals' ruling in this case. See *Relford*, 401 U.S. at 367-368.

Petitioner does not claim that the decision below conflicts with the decision of any other court of appeals. Rather, the gravamen of his claim (Pet. 9, 16-17) is that the Court of Military Appeals held that the status of the victims as military dependents, by itself, was sufficient to allow him to be tried by a court-martial on the Alaska child abuse charges. However, neither court below adopted any such rule. Both military courts made clear that their decision was based on all the evidence in the record as well as the factors identified by this Court in *Relford* and *Councilman* (Pet. App. 9a-16a, 35a-38a). Accordingly, this case does not present the question whether the fact that the victim was a military dependent, without more, empowers a court-martial to adjudicate a criminal charge against a serviceman.

Relying on three 1969 decisions of the Court of Military Appeals holding that the offense of sexual child abuse is not subject to court-martial jurisdiction where the crime is not committed on a military

base,<sup>8</sup> petitioner also argues at length (Pet. 11-18) that the Court of Military Appeals' decision in this case constitutes an unreasonable expansion of court-martial jurisdiction. However, the alleged conflict among Court of Military Appeals' decisions is for that Court to resolve; it does not call for this Court's intervention. Moreover, petitioner's argument lacks merit.

Prior to its decision in this case, the Court of Military Appeals had clearly held that the offense of sexual abuse is subject to court-martial jurisdiction where that offense is committed on a military base. See *United States v. Smith*, *supra*. By contrast, in opinions rendered before this Court's 1971 decision in *Relford v. Commandant*, *supra*, the Court of Military Appeals had ruled that the crime of sexual abuse of a minor was not subject to a court-martial where that offense occurred outside a military base, on the ground that there must be some connection between the defendant's military duties and the crimes in question (*United States v. McGonigal*, 19 C.M.A. 94, 95, 41 C.M.R. 94, 95 (1969)). The decision in *Relford*, however, undermined the rationale used by the Court of Military Appeals in its prior opinions on this issue. *Relford* held that the status of a victim as the dependent of a serviceman is an important consideration in determining whether an offense can be subject to court-martial jurisdiction (401 U.S. at 366). *Relford* also rejected the argument that a crime must be connected with a serviceman's "military duties" before it can be tried by a

<sup>8</sup> *United States v. Henderson*, 18 C.M.A. 601, 602, 40 C.M.R. 313, 314 (1969); *United States v. Shockley*, 18 C.M.A. 610, 611, 40 C.M.R. 322, 323 (1969); *United States v. McGonigal*, 19 C.M.A. 94, 94-95, 41 C.M.R. 94, 94-95 (1969).

court-martial (*id.* at 363-364, 366, 369).<sup>9</sup> Accordingly, it was entirely proper for the Court of Military Appeals to reconsider its prior decisions in light of *Relford*.<sup>10</sup> In light of other post-*Relford* decisions by the Court of Military Appeals, the decision in this case can hardly be considered unexpected.

3. Petitioner also contends (Pet. 10-12) that, even if the lower courts correctly held that he can be prosecuted by a court-martial for the Alaska charges, this holding cannot be applied to him without violating due process, since it was unforeseeable at the time he committed those offenses. Petitioner's claim, however, is not properly before the Court at this time. Aside from the fact that his conviction and sentence are still subject to review by both lower courts on his direct appeal, petitioner did not raise his claim in any of the courts below and therefore may not raise it in this Court for the first time. See, *e.g.*, *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, petitioner's claim lacks merit.

The cases on which petitioner relies, *Bowie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), are inapposite. Both cases forbade the unforeseeable judicial expan-

<sup>9</sup> In *Relford*, although the Court expressly found that "there was no connection between Relford's military duties and the crimes with which he was charged" (401 U.S. at 366), the Court nonetheless held that Relford could be tried by a court-martial (*id.* at 369).

<sup>10</sup> In *United States v. Trottier*, 9 M.J. 337, 340-342 (C.M.A. 1980), the court stated that *Relford* required it to reconsider its pre-*Relford* decisions, and in *United States v. Lockwood*, *supra*, the Court of Military Appeals ruled that the crime of forging a promissory note was subject to court-martial jurisdiction, even though it was committed off a military base.

sion of the substantive scope of a criminal statute to reach conduct that a person could not have reasonably believed was criminal at the time that he engaged in it.<sup>11</sup> Unlike the defendants in *Bowie* and *Marks*, however, petitioner clearly had ample warning that his alleged conduct was a crime. That conduct has been an offense under provisions of the Uniform Code of Military Justice that have remained unchanged since 1950,<sup>12</sup> and nothing in the decisions below expands or alters the definition of those crimes. Petitioner's conduct also violated Alaska law,<sup>13</sup> which renders untenable any claim that he could have believed that his conduct was innocent. See *United States v. Bass*, 404 U.S. 336, 348 n.15 (1971).

In this case, the lower courts simply held that a court-martial could properly exercise jurisdiction over petitioner for conduct that is manifestly criminal. Neither *O'Callahan* nor *Relford* held that the question whether a particular crime charged against a

<sup>11</sup> *Bowie* held that the Due Process Clause precluded the conviction of two black college students for their refusal to leave an "all-white" lunch counter where the "narrow and precise" (378 U.S. at 352) state criminal trespass statute under which they were charged on its face prohibited only the entry onto the property of another in violation of previously-given notice (*id.* at 349 n.1), and where, prior to the conduct at issue, that statute had never been construed to cover the refusal to leave the property of another (*id.* at 352). Similarly, *Marks* held that the standard for determining the constitutionality of obscene materials that was adopted in *Miller v. California*, 413 U.S. 15 (1973), could not be retroactively applied to conduct that occurred prior to the decision in that case (430 U.S. at 196-197).

<sup>12</sup> See Arts. 80, 120, 128, 134, UCMJ, 10 U.S.C. 880, 920, 928, 934.

<sup>13</sup> See Alaska Stat. §§ 11.41.410 to 11.41.470 (1983 & Supp. 1985).



serviceman can be tried in a military court-martial is an ingredient of the crime itself and must be set forth in a statute or established by the caselaw with the same degree of precision that is necessary for the elements of a crime. On the contrary, *Relford* and *Councilman* explicitly endorsed an "*ad hoc* approach" to the question whether a particular offense is "service-connected." 401 U.S. at 369; 420 U.S. at 760. Petitioner's reliance on *Bowie* and *Marks* is therefore misplaced.

In any event, the lower courts' rulings were not unforeseeable. At the time of the Alaska offenses, the sexual abuse of a minor on a military base was subject to court-martial jurisdiction, and the Court of Military Appeals had indicated that its pre-*Relford* decisions would be reconsidered in light of this Court's ruling in that case. As we have noted, the Court of Military Appeals made it clear after *Relford* that some off-base offenses would be subject to court-martial jurisdiction (*United States v. Lockwood*, *supra*). Because petitioner could have reasonably foreseen the lower courts' rulings in this case, there is no merit to his claim that he lacked adequate notice of the prospect that he might be tried before a court-martial. See *United States v. Rodgers*, 466 U.S. 475, 484 (1984); *Lockett v. Ohio*, 438 U.S. 586, 597 (1978).<sup>14</sup> Accordingly, there is no justification for refusing to apply the lower courts' interpretation of *O'Callahan* and *Relford* to petitioner's case.

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<sup>14</sup> Petitioner does not suggest that he relied on the Court of Military Appeals' pre-*Relford* decisions at the time he engaged in the conduct at issue in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

THOMAS J. DONLON  
*Lieutenant Commander*  
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*Commandant (G-LMJ)*  
*United States Coast Guard*

MAY 1986



APPENDIX

STATE OF ALASKA  
DEPARTMENT OF LAW  
CRIMINAL DIVISION/  
FIRST JUDICIAL DISTRICT  
OFFICE OF THE DISTRICT ATTORNEY

May 15, 1985

LCDR Frank E. Couper  
United States Coast Guard  
Third District  
Governor's Island, New York 10004

Re: YN1 Solorio

Dear Mr. Couper:

Please be advised that at this time, subject of future evaluation or developments, that the Department of Law, Criminal Division, State of Alaska, will defer the prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutorial arm of the Coast Guard. The bases for this decision are contained below.

It is my understanding that the Coast Guard has transferred the victims to the East Coast making it difficult and expensive for the State of Alaska to divert scarce resources to investigate and to prosecute the offenses. Apparently, the Coast Guard has a policy of transferring its personnel periodically, and when such transfers permit criminal offenders to distance themselves from civilian authorities, the Coast Guard has a special interest in seeing that its

(1a)

transfer policies do not permit criminal acts to go unpunished.

The Coast Guard has charged Solorio with other offenses involving child abuse that allegedly occurred on a Coast Guard installation at Governor's Island, New York. Considerations of judicial economy call for adjudicating all similar charges in one forum. Requiring child witnesses and their families to travel and testify in both New York and Alaska would be an unreasonable financial and administrative burden on both the Coast Guard and the State of Alaska as well as a personal burden on the families of the victims.

The alleged offenses in both Governor's Island and Juneau, Alaska were investigated by Coast Guard personnel. Because, at this time, no civilian child victims of prosecutable cases have been located, and all child victims are Coast Guard dependents, I believe that the Coast Guard has the greater interest in investigating and prosecuting both the Governor's Island and the Juneau charges.

It has been determined that the fathers of the victims who lived in Juneau were all assigned to the same Coast Guard command, the office of the Seventeenth Coast Guard District in Juneau, Alaska. The fathers were all rated Yeoman in the Coast Guard performing duties similar to Solorio's duties. Solorio knew that the female children who were allegedly abused were Coast Guard dependents because he worked with, played sports with, commuted with, and/or socialized with their fathers. Such alleged crimes, committed within the "Coast Guard family", affect the morale of Coast Guard personnel and their

working relationships on the job. The offense of child sexual abuse by a Coast Guard man damages the reputation of the Coast Guard in general, and Coast Guard personnel in particular. These various unique effects that the crime of child sexual abuse can have on service personnel and their families creates a distinct military interest that would not be fully considered in any state prosecution.

Prosecution by both the State of Alaska and the Coast Guard would pose numerous difficulties. Should both the state and the Coast Guard impose a sentence for similar crimes, the sentencing policies of a sentence of one trial may be negated by the sentence imposed by the other trial. Should one court favor rehabilitative sentencing and the other deterrent sentencing, neither policy would be accomplished. Should a Coast Guard court decide to retain YN1 Solorio in the service, a trial in Alaska would remove him from useful military service in the Coast Guard for at least the duration of a trial and perhaps for the duration of a sentence to confinement. For these and other reasons, consideration of all similar or related crimes by one trial forum will produce a more complete presentation of all available facts on the merits of the charges, and a more rational and integrated sentencing policy should there be guilty findings.

Because of these reasons, this office defers to the prosecution of YN1 Solorio by the Coast Guard for various alleged acts of attempted rape, indecent liberties, indecent acts, and indecent assaults against Amber Johnson and Jennifer Grantz which occurred at Solorio's residence at 8916 Birch Lane, Juneau, Alaska.

4a

Please feel free to contact me if you have any questions.

Sincerely,

NORMAN C. GORSUCH  
Attorney General

By:

LOUIS JAMES MENENDEZ  
Assistant District Attorney

cc: CDR Thomas Barrett (CCGD17)  
Richard Svobodny, District Attorney  
Sgt. Robin Lown, AST



No. 85-1581

Supreme Court, U.S.  
**FILED**

**APR 2 1985**

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1985

RICHARD SOLORIO,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

On Petition for a Writ of Certiorari to the  
United States Court of Military Appeals

**BRIEF OF THE AMERICAN CIVIL  
LIBERTIES UNION AS AMICUS CURIAE  
IN SUPPORT OF THE PETITION FOR A  
WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. Is the fact that the victim is a military dependent, without more, sufficient "service connection" to support the exercise of court-martial jurisdiction over an off-base civilian-type offense?

2. Was the decision below, which found court-martial jurisdiction in circumstances in which previous decisions had refused to do so, a plain violation of the rule of Bouie v. City of Columbia, 378 U.S. 347 (1964)?

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## Interest of the Amicus

The American Civil Liberties Union (ACLU) is a nationwide nonpartisan voluntary organization dedicated to the protection of constitutional rights. The ACLU has long taken an interest in the administration of criminal justice in the military, in addition to its general interest in the vindication of constitutional rights in civilian state and federal courts. Thus, the ACLU regularly appears as an amicus curiae in the United States Court of Military Appeals in cases that affect all the services.

The ACLU ordinarily avoids participating as an amicus prior to the grant of review. But the generic implications

of the decision below--which dramatically and unconstitutionally expands court-martial jurisdiction in the teeth of this Court's precedents as well as those of the court below--make this a case where such participation is imperative.[1]

In addition, the ACLU was actively involved in the legislative process leading to passage of the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, section 10 of which for the first time extended this Court's certiorari jurisdiction to a

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1. Consents from petitioner and respondent have been filed with the Clerk.

2. See generally The Military Justice Act of 1982: Hearings on S. 2521 Before the Subcomm. on Manpower and Personnel of the Sen. Comm. on Armed Services, 97th Cong., 2d sess. 198-263 (1982).

limited category of court-martial convictions.[2] To the extent that this case calls upon the Court to address for the first time the considerations governing the grant of certiorari in military cases arising on interlocutory government appeal, the Court, it is believed, would benefit from having the ACLU's views.

#### Argument

##### I.

#### **THE SWEEPING IMPACT OF THE DECISION BELOW AND THE UNIQUE STATUTORY LIMITATIONS ON APPELLATE REVIEW OF COURTS-MARTIAL MAKE REVIEW BY THIS COURT AN URGENT PRIORITY**

The facts of the case have been fairly stated in the Petition. In essence, the case presents for review the question whether, under O'Callahan v.



Parker, 395 U.S. 258 (1969), military jurisdiction over an off-base civilian-type offense may be predicated solely on the fortuity that the victim is a military dependent. While the question arises in the context of a Coast Guard court-martial, the decision below affects all of the military services. Its impact will be sweeping.[3]

As of March 31, 1985, there were 2,147,845 persons in uniform in the Army, Navy, Marine Corps and Air Force, of whom 1,398,779 were on active duty in the 50

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3. In addition, as we show in Point II infra, the case involves a clear violation of the rule that a new interpretation of a criminal statute may not be applied to conduct occurring prior to that interpretation. Hence, even if the decision below were correct on the merits (which it is not), the case would still have to be reversed.

States. As of September 30, 1984, there were 2,851,392 military dependents, of whom 2,462,222 were living in the 50 States.[4]

These data do not include dependents of military retirees. A subsequent decision of the court below, United States v. Scott, 21 M.J. 345 (C.M.A. 1986), appears to expand military jurisdiction over off-base civilian-type offenses (at least where the accused is an officer) to cases where the victim is a dependent of a retired military person even though the rule had long been that off-base civilian-type offenses against

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4. See generally Dep't of Defense, Defense '85 Almanac 24, 25-27, 31 (Sept. 1985). During Fiscal Year 1984, 12,009 persons were convicted by general or special courts-martial. 1984 Ann. Rep. of Code Comm. on Military Justice (1985).

retirees themselves were not subject to court-martial jurisdiction. United States v. Armes, 19 C.M.A. 15, 41 C.M.R. 15 (1969). Dependents of retired military personnel number in the millions.

Thus, the decision below signals a geometric increase in the pool of persons against whom civilian-type offenses may give rise to military prosecution. It correspondingly expands the reach of military jurisdiction beyond anything heretofore contemplated. Accordingly, certiorari should be granted.

The ACLU is mindful of the fact that this criminal case arises on interlocutory appeal--a procedural posture that sometimes influences the Court to withhold review. But see, e.g.,

Missouri v. Blair, No. 85-303, 54 U.S.L.W. 3460 (U.S. Jan. 13, 1986) (granting cert.). We respectfully submit that the unique aspects of direct review of court-martial convictions and events subsequent to the decision below combine to militate strongly in favor of an exception to that approach.

First, looking at the potential ramifications of taking review of a case such as this, the Court should have no concern about being buried under an avalanche of certiorari petitions in interlocutory appeals under Article 62 of the Uniform Code of Military Justice (UCMJ). 10 U.S.C. sec. 862 (Supp. III 1985). From the time the new certiorari provision of the Code took effect on August 1, 1984, to February 27, 1986,

there were only 13 petitions to the Court of Military Appeals for discretionary review of court of military review decisions under Article 62. Of those, only 6 were granted. Since only granted cases are even eligible for review in this Court, see 10 U.S.C. sec. 867(h)(1)(Supp. III 1985), there need be no concern about impact on the Court's docket.

Moreover, the statutory framework for Supreme Court review of courts-martial is unlike that applicable to either state or civilian federal convictions. All federal criminal cases are appealable as of right to the courts of appeals, 28 U.S.C. secs. 1291-92 (1982), and in State cases, certiorari runs to "the highest court of a State in

which a decision could be had." 28 U.S.C. sec. 1257 (1982). Most military convictions, in contrast, are not subject to direct review in any court, see generally Fidell, Military Rights of Appeal, 8 Dist. Law. No. 6, 42 (July-Aug. 1984), and, more importantly, Congress made no provision for direct review by this Court of cases that either do not meet the sentencing threshold for review in the military judicial system or in which the Court of Military Appeals denies discretionary review. See generally Boskey & Gressman, The Supreme Court's New Certiorari Jurisdiction Over Military Appeals, 102 F.R.D. 329, 336 (1984).

The extraordinary constraints on appellate review of courts-martial in



general, and the absence of a provision for certiorari to reach cases insulated from or refused review by the higher military courts, make it urgent that this Court take a "hard look" at cases such as Solorio's, which involve sea changes in the jurisdiction of military courts, before concluding that the policy against certiorari in interlocutory criminal appeals should be invoked.

Second, with respect to this particular case, although the decision below was interlocutory (having been stimulated by a prosecution appeal from the dismissal of charges relating to off-base conduct in Alaska), the trial proceeded, and Solorio was convicted on 8 of the 14 Alaska offenses on March 11, 1986. His case will now be reviewed by

the Coast Guard district commander who referred the charges for trial in the first place, and then by the Coast Guard Court of Military Review, which perforce must apply the jurisdictional decision here on review.

Whether the Court of Military Appeals will hear the case following action by the Court of Military Review is an open question. Its jurisdiction over this case is discretionary, and it took no steps in its decision to ensure that the record would be returned to it following completion of the trial. Since this Court can only hear the merits of the case if the Court of Military Appeals grants a petition for review, there can be no assurance that Solorio will ever be able to have the fundamental issue of

jurisdiction examined here on direct review.[5] As a result, the current Petition may be Solorio's only opportunity to obtain review of the issue presented. Cf. Garrison v. Hudson, 104 S. Ct. 3496 (Burger, Circuit Justice 1984)(granting stay).

Indeed, this may be this Court's only opportunity to review the important issue presented on the merits since the service connection question will now be considered settled law by the courts

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5. Collateral review is unlikely since the military does not make free counsel available for that purpose, and public defender programs do not include military accuseds in their activities. In any event, collateral review is not a substitute for direct review in an Article III court. Guam v. Olsen, 431 U.S. 195, 202 (1977). This Court is the only Article III court with appellate jurisdiction over the Court of Military Appeals. Hearings, supra, at 212 n.13 (ACLU testimony).

below. The Court of Military Appeals can thus be expected to deny petitions for review on the issue, thereby precluding review here.

In the circumstances, while the ACLU strongly believes that no useful purpose would be served by delaying the reversal this case merits, we recognize that the Court might wish to defer action on the Petition until it becomes clear whether the case will ever come before it following final review of the conviction.[6] If the Court of Military Appeals denies review, the Court could proceed to address the merits of the current Petition; if that court grants

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6. See generally R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice sec. 5.9, at 274 (6th ed. 1986)(collecting cases).

review and a second Petition is filed, the two cases could be consolidated.

## II.

BECAUSE THE DECISION BELOW OVERRULED  
PRIOR DECISIONS REFUSING TO PERMIT  
COURT-MARTIAL JURISDICTION TO BE  
PREDICATED SOLELY ON THE VICTIM'S  
STATUS AS A DEPENDENT, IT WAS A  
VIOLATION OF DUE PROCESS TO APPLY  
A DIFFERENT RULE TO SOLORIO

The decision below is a textbook illustration of the practice condemned in Bouie v. City of Columbia, 378 U.S. 347 (1964), and Marks v. United States, 430 U.S. 188 (1977). A statute simply cannot be reconstrued by a court to criminalize conduct previously held not to be proscribed and the new gloss applied to the very case in which the change is announced, nor, as the Ninth Circuit has observed in another context, could the court below "make a federal crime out of

acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law." Woxberg v. United States, 329 F.2d 284, 293 (9th Cir. 1964).[7] That is precisely what happened to Solorio.

Any suggestion that the decision below does not represent a substantial break from the precedents is an "appeal to unreality." Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting). In a series of cases, three

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7. See also United States v. Juvenile, 599 F. Supp. 1126, 1131 (D. Ore. 1984) ("retrospective establishment of federal jurisdiction violates the ex post facto clause").

8. United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969).



of which are cited on page 254 of the decision,[8] the court below had held that service connection over off-base civilian-type offenses could not rest solely on the victim's status as a military dependent.[9] Indeed, in Fleiner v. Koch,[10] the court unanimously granted a writ of prohibition barring the trial of charges of indecent assault on and indecent acts with the accused's civilian ward while in civilian premises in San Diego.

Nor can it be said that Solorio

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9. See also United States v. Snyder, 20 C.M.A. 102, 42 C.M.R. 294 (1970)(off-base assault and involuntary manslaughter; held, no service connection), cited in H. Moyer, Justice and the Military 176 (1972).

10. 19 C.M.A. 630 (1969)(mem.), noted in Justice and the Military, supra, at 179.

was on notice because of decisions of the Court of Military Appeals in other O'Callahan cases. That court never suggested, until this case, that its decisions in McGonigal, Shockley, Henderson or Snyder were not good law. United States v. Trottier, 9 M.J. 337 (C.M.A. 1980), cited below for the proposition that "some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience," 21 M.J. at 254 & n.1, was a narcotics case and in no way afforded Solorio or anyone else fair notice that the unbroken line of precedents on the precise point here in issue was no longer valid, or represented an area in which one proceeded at one's own risk, so to speak.

The Trottier opinion, which was joined by only two of the judges (the third concurred in the result), went so far as to point out that "drug offenses, through their debilitating effects, have a relevance to combat readiness that rape or robbery normally do not." 9 M.J. at 346 n.22. Far from alerting the reader that sex offenses such as those of which Solorio has been convicted would fall under the same rule, such a comment clearly limited the holding and set narcotics cases aside as a special category.

Events subsequent to Trottier confirm that the victim's status as a dependent has continued to be deemed insufficient to warrant trial by court-martial for off-base offenses that

are civilian in character. For example, even after the time of the offenses of which Solorio was convicted (and while this case was wending its way through the appellate process), a Navy judge dismissed charges of off-base forcible sodomy and assault of an accused's wife. See United States v. Wilson, 21 M.J. 381 (C.M.A. 1985)(mem.). The government obtained a reversal from the Court of Military Review, but the accused appealed to the Court of Military Appeals, which granted a stay. The case was ultimately mooted when he was discharged from the service, but the trial judge's action and the Court of Military Appeals' stay can hardly be reconciled with the claim that Solorio was on notice that his conduct violated the UCMJ.

Even the latest edition of the Manual for Courts-Martial, drafted by the Defense Department, gives no indication that the unbroken line of cases on this point was in doubt. See Manual for Courts-Martial, United States, 1984 at II-14 to -15.

Since the Court of Military Appeals has itself invoked the Bouie principle at least once in the past, United States v. McDonagh, 14 M.J. 415, 419-23 (C.M.A. 1983), we can only surmise that the fact that that court--whose full complement is only three judges--was sitting with two judges may have contributed to a less than complete exploration of the issues. For two judges to overturn an unbroken line of precedents on an important issue would

seem to be particularly unsound as a matter of judicial administration.

### III.

THE VICTIM'S STATUS AS A MILITARY  
DEPENDENT IS INSUFFICIENT, AS A  
MATTER OF CONSTITUTIONAL PRINCIPLE  
AND ON THE RECORD OF THIS CASE,  
TO SUPPORT MILITARY JURISDICTION  
AND THE CORRESPONDING TRUNCATION  
OF SOLORIO'S CONSTITUTIONAL RIGHTS

Because the case should be summarily reversed on the authority of Bouie and Marks, the Court need not address the merits of the Court of Military Appeals' ruling on service connection in dependent victim cases. Cf. Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355, 369-70 (1971)(deferring consideration of retrospectivity). However, in the event the Court declines to reverse on the retroactive reinterpretation point, it



should certainly reverse on the merits.

In Toth v. Quarles, 350 U.S. 11, 22 (1955), the Court held that military tribunals should be restricted "to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service." The decision below is irreconcilable with Toth. Not one of the bases asserted by the Court of Military Appeals withstands serious scrutiny.

1. The court relied on the "recent development in our society" of "an increase in the concern for victims of crimes." 21 M.J. at 254. There is, however, nothing peculiar to the military in this evolution, and nothing in the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248, cited at 21

M.J. 255 n.2, the relevance of which was neither briefed nor argued below, suggests that Congress intended it to be the fulcrum for an expansion of court-martial subject matter jurisdiction. Alaska has its own legislation for the protection of victims and for their participation in the criminal and parole processes. Alas. Stat. secs. 12.55.022, 12.55.025, 12.61.010, 33.15.065 (1984). None of the other factors cited by the court below in support of its conclusion represents a change from conditions in effect in 1969 when O'Callahan was decided.

2. The court suggested that the distraction or emotional upset associated with the potential knowledge that a servicemember had committed sexual

misconduct with a child would impede others' performance of military duty. This is far too elusive a test for determining whether military jurisdiction exists. Military jurisdiction is not a family affair whose parameters are to be decided by how distraught the victim's relatives (or, for that matter, friends) may be. Many kinds of off-base events could conceivably have an adverse impact on morale, see 21 M.J. at 256, but that is an insufficient foundation for carving an exception to the rule of O'Callahan and Relford that civilian-type offenses should be punished by civil authorities.

3. The right to grand jury indictment is protected under Alaska law, Alas. Const. art. I, sec. 8, trial by jury is available, and trial and

appellate judges (unlike military trial and intermediate appellate judges) enjoy the protection of a term of office. The record is clear that the Alaska offenses could have been prosecuted by the State. Similar offenses had been so prosecuted in the recent past, and the State prosecutor did not refuse to prosecute Solorio. Rather, playing "Alphonse" to the Coast Guard's "Gaston," he "deferred" to the military. But Solorio's due process rights under State law and the Fourteenth Amendment cannot be waived by a State prosecutor. See generally Justice and the Military, supra, at 197.

4. The fact that Solorio and the Alaska victims were no longer in Alaska, 21 M.J. at 257, is completely immaterial. They left pursuant to

military orders. The military cannot now use the transfers--even if done in the ordinary course of business--as a basis to bootstrap the exercise of military jurisdiction over offenses that otherwise could not have been subject to that jurisdiction. Moreover, in our increasingly mobile society, State prosecutors have to deal with out-of-state defendants and witnesses every day in the week. There is nothing unusual (much less unique), therefore, in the hurdle that faced the Alaska prosecutor.

5. Similarly, the fact that witnesses might have to testify twice, or that separate State and federal rehabilitation programs might be available, 21 M.J. at 257-58, is scarcely

unique to the setting of this case. Precisely the same circumstances exist whenever an individual is prosecuted by both State and federal authorities or by two States. The military is covered by the Interstate Agreement on Detainers, 18 U.S.C. App. sec. 5 (1982); United States v. Greer, 21 M.J. 338, 340 (C.M.A. 1986), [11] one of the purposes of which is "to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future." 32 C.F.R. sec. 720.15(a)(1985); see Interstate Agreement art. I.

Congress has also directed, in Article 14(b) of the UCMJ, that delivery

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11. Alaska is also a party to the Interstate Agreement. Alas. Stat. secs. 33.35.010 to -.040.



of a sentenced military prisoner to civil authorities, "if followed by conviction, interrupts the execution of the sentence of the court-martial." 10 U.S.C. sec. 814(b)(1982); see also R.C.M. 1113(d)(2)(A)(ii). The purposes of this provision are "avoiding any conflict with the concurrent sentencing of civil courts and preserving intact independent military sentencing." See Edwards v. Madigan, 281 F.2d 73, 77 (9th Cir. 1960). The concern that animated the court below with respect to rehabilitation programs, therefore, is one that Congress has already addressed and resolved without the jurisdictional voraciousness implicit in the decision on review in this case.

6. Finally, the notion that the Coast Guard prosecutor might have wanted

to use the Alaska offenses as evidence of other crimes under the military equivalent of Rule 404(b) of the Federal Rules of Evidence, even if they were not before the court-martial for trial, 21 M.J. at 257-58, is irrelevant to the question of service connection. Jurisdiction determines the scope of what may be proven at trial, not vice versa.

In sum, there is no such thing as "pendent" court-martial jurisdiction, any more than there is "pendent" district court jurisdiction over State crimes committed by an individual who has also been charged under some federal law. The decision below pays lip service to the point, 21 M.J. at 257, but violates it in fact. Until United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983)(2-1), which was

never examined here because it was decided before Congress expanded the certiorari jurisdiction, the Court of Military Appeals had consistently honored this principle by reversing off-base portions of cases other portions of which were service connected.[12] Corrective action by this Court is necessary to nip this new and disturbing approach in the bud.

In these times of increased concern about the arrogation of power to the Federal Government at the expense of the States, this Court should be slow to approve a new rule that injects the Federal Government (and especially the

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12. E.g., United States v. Shockley, supra; cf. Fleiner v. Koch, supra; see generally Justice and the Military, supra, at 178 (collecting cases).

military) into an area of interpersonal conduct that historically has been the responsibility of State and local authorities. The ACLU also questions whether public policy is advanced by a rule that increases the insularity of the military. The decision below accelerates the transformation of the military and its enormous dependent community into a khaki ghetto even further removed from the larger society which it serves.

The Court of Military Appeals "did not enthusiastically embrace the lessening of its jurisdiction" under O'Callahan. Willis, The United States Court of Military Appeals--"Born Again," 52 Ind. L.J. 151, 155 (1976). From the beginning, the military and its partisans have complained that the decision was

unwise because of the uncertainty it allegedly caused as to the contours of court-martial jurisdiction. In fact, however, the O'Callahan doctrine, particularly with the Relford gloss, quickly evolved into a well-defined set of rules. The only area of real uncertainty has been the narcotics problem, and that uncertainty has been dispelled by the Court of Military Appeals' recent decisions addressed specifically to that problem.[13]

As it happens, the real basis for concern over uncertainty is not one of unclear line-drawing, but rather the

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13. The ACLU does not concede the correctness of the approach employed by the court below in this area, but that issue is not before the Court in this case.

impact of extraordinary personnel turbulence on a 3-judge court. In these circumstances, the need for judicial restraint and adherence to stare decisis--always strong in the criminal law field--is unusually compelling.[14] We stress this factor lest the Court be misled into believing that the root of the difficulty in the decision below is inherent in either O'Callahan or Relford. It is emphatically not.

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14. See generally Hearings on H.R. 6406 and H.R. 6298 (Revision of the Laws Governing the U.S. Court of Military Appeals and the Appeals Process) Before the Military Personnel Subcomm. of the House Armed Services Comm., 96th Cong., 2d sess. 54-55, 63 (1980). The need for restraint is even stronger, of course, when there is a vacancy on a 3-judge court. See id. at 77, 79.



### Conclusion

For the foregoing reasons, certiorari should be granted. Because the decision below so clearly conflicts with Bouie and Marks, summary reversal is appropriate. Alternatively, for the reasons stated in Point I of this brief, the Court might wish to defer action until it becomes clear whether the case will come before it following review of the conviction.

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April 1986

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

RICHARD SOLORIO

YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF MILITARY APPEALS

**BRIEF OF DEFENSE APPELLATE DIVISION,  
UNITED STATES ARMY, AS *AMICUS  
CURIAE* IN SUPPORT OF THE PETITION  
FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

I. WHETHER it is constitutionally permissible for the military to exercise court-martial jurisdiction over an offense which, upon application of the detailed analysis mandated by this Court, is not "service connected".

II. WHETHER any cogent or compelling reasons exist for the Court of Military Appeals to depart from a detailed application of the "service connection" test set forth by this Court in *O'Callahan* and *Relford*.



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The parties have consented to the submission of this *amicus curiae* brief by the Defense Appellate Division in support of the petitioner. Copies of the consents have been filed with the court.

### INTEREST OF THE DEFENSE APPELLATE DIVISION

The Defense Appellate Division represents soldier-clients before the U.S. Army Court of Military Review, the U.S. Court of Military Appeals and the U.S. Supreme Court pursuant to Article 70(c), Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 870(c) (1982). The Division is the principle source of appellate representation for all convicted Army soldiers who are sentenced to a punitive discharge or confinement for one year or more. In 1985, Defense Appellate Division attorneys represented over 2200 soldiers before the U.S. Army Court of Military Review.<sup>1</sup>

<sup>1</sup> Defense Appellate Division, 1985 Annual Report.



The Defense Appellate Division represents soldiers who have been<sup>2</sup> and will be adversely affected by the decision of the U.S. Court of Military Appeals in this case. If permitted to stand, the decision in this case will encourage an expansion of military jurisdiction and deprive a potentially significant number of soldier-clients of fundamental rights and protections they would have enjoyed if prosecuted in Article III courts.

### STATEMENT OF THE CASE

The petitioner was charged with committing a variety of sex offenses<sup>3</sup> against two dependent daughters of active duty Coast Guard members. These offenses were alleged to have occurred in petitioner's private home located eleven miles from his place of duty, the federal office building in downtown Juneau, Alaska. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). The petitioner had minimal military contacts with the fathers of the alleged victims.

The allegations against petitioner were made after he and the fathers of the alleged victims were permanently transferred from Juneau, Alaska. *United States v. Solorio*, 21 M.J. at 514. The state of Alaska deferred prosecution of petitioner to the "legal prosecutorial arm of the Coast Guard" but was, at the time of petitioner's trial, continuing to investigate the allegations. (Appellate Exhibit IX; R. 87).

At trial, the defense moved to suppress the specifications alleging sex offenses at Juneau, Alaska, for lack of subject matter jurisdiction.<sup>4</sup> After hearing evidence and argu-

<sup>2</sup>The government recently appealed one case which had been dismissed at trial for lack of subject matter jurisdiction. Based on the decision in the *Solorio* case, the Army Court of Military Review reversed the military judge's ruling and reinstated the charges. *United States v. Abell*, Misc. Docket No. 1986/1 (A.C.M.R. 11 March 1986) (unpub.) (Appendix A).

<sup>3</sup>Petitioner was alleged in 14 separate specifications to have committed attempted rape, indecent and simple assaults, lascivious acts and indecent liberties in violation of Articles 80, 128 and 134, UCMJ.

<sup>4</sup>Several additional specifications alleged that petitioner committed sex offenses at a military base on Governor's Island, New York. These were not included in the defense motion to dismiss.

ments on the motion, the military judge granted the defense motion and dismissed the specifications alleging offenses at Juneau, Alaska. In his essential findings of facts, the military judge found that none of the *Relford v. Commandant*, 401 U.S. 355 (1970) [hereinafter referred to as *Relford*] factors supported a finding of service-connection. Pursuant to Article 62, UCMJ, the government appealed the military judge's ruling to the Coast Guard Court of Military Review, which granted the government appeal and reversed the ruling of the military judge. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). The United States Court of Military Appeals subsequently granted review of the Coast Guard Court's decision and affirmed. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986). The Appellant petitioned both the Court of Military Appeals and this Court for a stay pending review by this Court.

The petitioner was tried on March 11, 1986, after both this Court and the Court of Military Appeals denied petitioner's stay. He was convicted of eight offenses committed in Alaska.

### ARGUMENT

#### I. BECAUSE IT ENTAILS THE LOSS OF FUNDAMENTAL CONSTITUTIONAL RIGHTS, COURT-MARTIAL JURISDICTION HAS HISTORICALLY BEEN RESTRICTED TO THAT ABSOLUTELY ESSENTIAL TO MAINTAIN DISCIPLINE.

One of the early grievances protested by the American colonists was that crimes committed by soldiers should be tried in civil, not military courts. *Reid v. Covert*, 354 U.S. 1, 27-28 (1957); *O'Callahan v. Parker*, 395 U.S. 258 (1969) [hereinafter referred to as *O'Callahan*]. As a result of these views, court-martial jurisdiction was extremely limited in the first Articles of War.<sup>5</sup> Throughout the early history of this country, attempts to broaden the scope of court-martial jurisdiction beyond its traditional limits were repelled by the

<sup>5</sup>The Articles of War enacted by the Continental Congress in 1776 were largely patterned after the British articles which required soldiers accused of offenses punishable by civilian courts to be delivered to a civil magistrate. 1776 Articles of War, Section X, Article 1, reprinted in W. Winthrop, *Military Law and Precedents*, 964 (2d Ed. 1920).

judiciary which reaffirmed the basic precept that military courts are subordinate to civilian tribunals. *See, e.g., Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). However, through a series of legislative enactments culminating with the passage of the Uniform Code of Military Justice in 1950 [hereinafter referred to as 1951 Code], court-martial jurisdiction was gradually expanded.<sup>6</sup>

This Court took an active role in defining the limits of court-martial jurisdiction after enactment of the 1951 Code and reversed the legislative trend toward expanding military jurisdiction. In *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955), this Court held that an ex-serviceman was not amenable to court-martial jurisdiction after being discharged for an offense committed five months before his discharge. According to this Court, the attempted encroachment on the jurisdiction of Article III courts was constitutionally impermissible. This Court reasoned that nothing in the "history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property." *Id.* at 17.

Using a similar rationale, this Court struck down a section of the 1951 Code authorizing trial by court-martial of dependents accused of committing capital offenses even though they may be accompanying our Armed Forces abroad. *Reid v. Covert*, 354 U.S. 1 (1957). Citing the deficiencies of the military justice system, the Court concluded that a "military trial does not give an accused the same protection which exists in the civil courts." *Id.* at 37.

In *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960), this Court extended the holding in *Reid v. Covert*, *supra*, and held that the peacetime prosecution of a soldier's dependent wife for a noncapital offense committed overseas was not constitutionally permissible under Article III and the

<sup>6</sup> The expansive approach taken by Congress in the 1951 Code is reflected in Article 2 which included, under certain circumstances, military jurisdiction over civilians. Uniform Code of Military Justice, Article 2(11), 50 U.S.C. § 552 (1956).

fifth and sixth amendments.<sup>7</sup> In two related cases, this Court further limited court-martial jurisdiction over civilian dependents of serviceman and over civilian employees of the government. *Grisham v. Hagen*, 361 U.S. 278 (1960); *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

These cases set the stage for the landmark case which restricted court martial jurisdiction only to those offenses that are "service-connected". *O'Callahan v. Parker*, *supra*. Justice Douglas, writing for the majority, recognized the power of Congress to make rules for the regulation of land and naval forces, but expressed the view that court-martial jurisdiction must be restricted to the narrowest "deemed absolutely essential to maintaining discipline among troops in active service." *Id.* at 265, quoting *Toth v. Quarles*, 350 U.S. at 22. In *O'Callahan*, the Court extensively reviewed the history of court-martial jurisdiction and observed that this historically restrictive approach was appropriate because "a civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 266. This Court rejected the government's contention that the status of the accused alone was determinative, and listed several factors to determine whether an offense was sufficiently service connected to constitutionally permit military prosecution.

In *Relford*, this Court considered whether a court-martial had jurisdiction over rape and kidnapping offenses committed by a servicemember on a military post by reference to the factors cited in *O'Callahan*. Although noting that some factors<sup>8</sup> operated against finding jurisdiction, the Court

<sup>7</sup> The only test for determining court-martial jurisdiction at the time of this decision was "one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'" *Kinsella v. United States ex rel. Singleton*, 361 U.S. at 240-241.

<sup>8</sup> The factors listed in *Relford* are: 1) the serviceman's proper absence from the base, 2) the crime's commission away from the base, 3) its commission at a place not under military control, 4) its commission within our territorial limits and not in an occupied zone of a foreign country, 5) its



nevertheless held that "a serviceman's crime against the person of an individual upon the base or against property on the base is service connected" within the meaning of the requirement as specified in *O'Callahan*. . . ." *Id.* at 369. The Court in *Relford* reaffirmed the continued vitality of *O'Callahan*, but observed that its decision "marks an area, perhaps not the limit, where court-martial [jurisdiction] is appropriate and permissible." *Id.* at 369.

In the most recent case addressing the limits of court-martial jurisdiction, *Schlesinger v. Councilman*, 420 U.S. 738 (1975), a majority of this Court decided that a federal court should not enjoin a pending court-martial on the ground that the charges were not service connected. This Court theorized that the judgment of the military court was indispensable to determining factors relevant to gauging service connection, such as the impact of the offense on military discipline and whether the military interest can be adequately vindicated in civilian courts. *Id.* at 759. The majority in *Councilman*, while properly desiring to have the benefit of the military tribunals' views on the impact of a particular offense on discipline, clearly did not overrule *O'Callahan* or express an opinion that can be interpreted as authorizing anything less than applying the detailed service connection analysis set forth in *O'Callahan* and *Relford* to resolve questions of military jurisdiction.

## II. THE COURT OF MILITARY APPEALS, IN A SERIES OF CASES CULMINATING IN THE INSTANT CASE, HAS GRADUALLY ERODED THE SERVICE CONNECTION TEST AND EXPANDED COURT-MARTIAL JURISDICTION BEYOND ITS OWN ESTABLISHED PRECEDENT.

commission in peacetime and its being unrelated to authority stemming from the war power, 6) the absence of any connection between the defendant's military duties and the crime, 7) the victim's not being engaged in the performance of any duty relating to the military, 8) the presence and availability of a civilian court in which the case can be prosecuted, 9) the absence of any flouting of military authority, 10) the absence of any threat to a military post, 11) the absence of any violation of military property, 12) the offenses being among those traditionally prosecuted in civilian courts.

The task of implementing *O'Callahan* and *Relford* was largely left to the Court of Military Appeals.<sup>9</sup> That court was initially intent on following the mandate set forth in those cases:

What *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.

*United States v. Moore*, 1 M.J. 448, 450 (C.M.A. 1976). The court's detailed application of the jurisdictional criteria enunciated in *O'Callahan* and *Relford* led to determinations of a lack of jurisdiction in a significant number of military cases<sup>10</sup> involving a variety of off-post offenses including the use, sale and transfer of drugs,<sup>11</sup> sex offenses,<sup>12</sup> and property crimes.<sup>13</sup> In several of these cases, the court found that

<sup>9</sup> From time to time, however, federal courts have intervened *See, e.g.*, *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972); *Reed v. Middendorf*, 383 F.Supp. 488 (C.D. Cal. 1974); *Chastain v. Siay*, 365 F. Supp. 522 (D. Colo. 1973).

<sup>10</sup> *See generally* the cases cited in Annot., 14 A.L.R. Fed. 152, § 20 (1973). *See also* *Cole v. Laird*, *supra* at n.9.

<sup>11</sup> *United States v. Strangstaelen*, 7 M.J. 225 (C.M.A. 1979); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Klink*, 5 M.J. 404 (C.M.A. 1978); *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977); *United States v. Williams*, 2 M.J. 81 (C.M.A. 1976); *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976). These cases retracted the earlier view of the Court of Military Appeals that drug offenses were virtually *per se* service connected. *See* *United States v. Beeker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>12</sup> *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Borys*, 18 C.M.A. 547, 40 C.M.R. 259 (1969).

<sup>13</sup> *United States v. Hopkins*, 4 M.J. 260 (C.M.A. 1978); *United States v. Sims*, 2 M.J. 109 (C.M.A. 1977); *United States v. Hedlund*, 2 M.J. 11 (C.M.A. 1976); *United States v. Uhlman*, 1 M.J. 419 (C.M.A. 1976); *United States v. Camacho*, 19 C.M.A. 11, 41 C.M.R. 11 (1969); *United States v. Crapo*, 18 C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Chandler*, 18 C.M.A. 593, 40 C.M.R. 305 (1969); *United States v. Prather*, 18 C.M.A. 560, 40 C.M.R. 272 (1969).



there was no service connection even though, as in this case, the victim of the offense was a military dependent.<sup>14</sup>

Adherence to the *O'Callahan-Relford* jurisdiction test continued until 1980 when the court re-examined the restrictive approach it had followed in drug cases and adopted the more expansive view that "almost every involvement of service personnel with the commerce in drugs is 'service connected.'" *United States v. Trottier*, 9 M.J. 337, 350 (C.M.A. 1980). The court recognized that it was departing from its established analysis of strictly applying the *Relford* criteria but opined that a more flexible application of the concept "could be implied" from this Court's opinions. *Id.*

Three years later the court held that a court-martial had jurisdiction to try a soldier for off-post larcenies committed by using a stolen military identification card. *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). While admitting that this result was not consistent with its precedents, the court stated that it now attached "considerable importance" to circumstances previously considered insignificant. *Id.* at 10. Understandably perplexed, Judge Fletcher wrote:

I cannot fault a court for reconsidering decisions they feel were decided contrary to the law at the time of those decisions. I do, however, have a problem when the court uses the same decisions available to the former sitting court and arrives at a contrary conclusion without an adequately expressed rationale as to why the earlier decisions were contrary to the law.

The reasons advanced by the majority for jurisdiction resting in the military society seem to be related more to the question of organizational vanity rather than answering a strict question of law. . . .

*Id.* at 10-11. (Fletcher, J., dissenting).

The trend of expanding court-martial jurisdiction continued in subsequent cases. The court held that the use of drugs by a serviceman on extended leave far from a military installation would be service-connected if he re-enters the in-

<sup>14</sup> See, e.g., *United States v. McGonigal*, *supra*; *United States v. Shockley*, *supra*. See also, *United States v. Snyder*, 20 C.M.A. 102, 42 C.M.R. 294 (1970); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

stallation subject to the effects of the drug. *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983). It summarily affirmed a lower court decision which broadly held that military jurisdiction vested over any offense committed by servicemen overseas. *United States v. Holman*, 19 M.J. 784 (A.C.M.R. 1984), *aff'd*, 21 M.J. 149 (C.M.A. 1985), *cert. denied*, \_\_\_ U.S. \_\_\_ (1986). See also *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

The instant case is a significant step toward completely eroding the *O'Callahan* and *Relford* service-connection test and substituting in its place an everchanging unenforceable standard. The court in *Solorio* recognized that finding court-martial jurisdiction over off-base sex offenses against civilian dependents was inconsistent with its previous decisions. However, the court once again rationalized departing from precedent by stating that "earlier opinions on service-connection should be reexamined in light of more recent conditions and experience." *United States v. Solorio*, 21 M.J. at 254. The "new development" cited by the court was society's greater "concern for the victims of crimes." *Id.* at 254. Ultimately, the court concluded that service connection may be predicated upon the "continuing effect on the victims and their families 'which ultimately impacts' on the morale of any military unit or organization to which the family member is assigned." *Id.* at 256.

#### A. THE DECISION BELOW IS CONTRARY TO *O'CALLAHAN* AND *RELFOED* AND DEVOID OF PERSUASIVE RATIONALE.

It is well settled that "[t]he determination of service connection should be made after a particular consideration of the factors set forth in *Relford*, and the explicit constitutional values that motivated the *O'Callahan* court." *Reed v. Middelendorf*, 383 F. Supp. 488, 489-90 (C.D. Cal. 1974). The approach taken by the court in this case completely fails to comply with either of these constitutionally required and essential steps. The court in this case obviously did not engage in a "detailed, thorough analysis" of the *Relford* jurisdictional criteria, but instead predicated jurisdiction solely upon the unsubstantiated, presumed, indirect impact the offense had on the

military. The record is devoid of any direct or empirical evidence that the offenses had a greater impact upon the morale of the military organization than the commission of any other serious offense. The court virtually ignored the findings of the military judge which are detailed and specific, and which uniformly militate against subject matter jurisdiction. It is equally apparent that little heed was given to the principal premise upon which the *O'Callahan* decision rests: that military jurisdiction deprives citizens of the fundamental protections guaranteed by the Bill of Rights and Article III of the Constitution, and must be limited "to the least possible power adequate to the end proposed." *O'Callahan v. Parker*, *supra* at 265, citing *Toth v. Quarles*, *supra* at 23.<sup>15</sup> The unwarranted expansion of court-martial jurisdiction in this case is accomplished by depriving petitioner of such basic and fundamental rights as a trial free from possible coercion or influence by the executive or legislative branch, indictment by a grand jury, and the right to trial by jury. *Toth v. Quarles*, 350 U.S. at 16.

No persuasive rationale exists for departing from established law to permit the military to prosecute Yeoman First Class Solorio for the off-post offenses committed in Alaska. Virtually the only "service connection" relied upon by the court to sustain jurisdiction is the "continuing effect" of the offenses on the victims and their families. This effect was, under the circumstances of this case, no different than the effect a sex crime typically has on any victim and his or her family. The facts revealed that the parties had only limited military contacts and were not even stationed together when the offenses were reported. Yeoman First Class Solorio's offenses had no direct impact on the military and actually presented less of a risk of harm to the reputation and honor of the Coast Guard than many other crimes clearly falling

<sup>15</sup> "There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Toth v. Quarles*, *supra* at 22.

within the purview of civilian courts. The service connection in this case is simply too superficial and indirect to support a finding of court-martial jurisdiction.

The court below appears to recognize the lack of service-connection in this case based on a traditional analysis. The court therefore ignores the *O'Callahan-Relford* factors and considers the pendency of other military charges and the failure of the civilian courts to prosecute as primary factors supporting military jurisdiction. However, nothing in *O'Callahan* or *Relford* suggests that these considerations are relevant to the service connection inquiry.<sup>16</sup> The omission of these considerations from the *Relford* service connection analysis is sound. The military's interest in trying all alleged offenses at the same time does not, and should not, equate to a license to prosecute soldiers for offenses which are not otherwise sufficiently service connected.<sup>17</sup> Similarly, the fact that a civilian jurisdiction has deferred prosecution does not rationally support the exercise of military jurisdiction over off-post, civilian-type offenses. The outer limits of military jurisdiction should not be allowed to fluctuate to accommodate the peculiar whims and changing interests of local jurisdictions. The foregoing considerations are perhaps appealing from a cost-effectiveness standpoint, however, the decision to deprive soldier citizens of their right to be tried in Article III courts should be based on factors more compelling than economics or convenience. These two factors should not be considered pertinent to the service-connection inquiry and the court's reliance on them reflects a fundamental misunderstanding of the teachings of *O'Callahan*.

<sup>16</sup> See *United States v. Shockly*, *supra*, in which similar off-post charges were dismissed, even though other service-connected charges existed.

<sup>17</sup> Even assuming, *arguendo*, that the pendency of other charges is relevant to the service connection inquiry, the two sets of offenses in this case were so unrelated in time, place, and circumstances, that any benefit to trying all offenses together is negligible and does not outweigh the infringement of petitioner's constitutional rights. Cf. *United States v. Scott*, *supra*, (exercise of military jurisdiction over pendant off-post offenses can be supported when the offenses are closely related in time, place, and circumstances to the on-post offenses).



**B. THE MILITARY JUSTICE SYSTEM TODAY FAILS TO PROVIDE THE SAFEGUARDS AFFORDED BY ARTICLE III COURTS AND THERE HAVE BEEN NO SIGNIFICANT CHANGES IN MILITARY OR CIVILIAN SOCIETY NECESSITATING THE OVERRULING OR LIMITING OF *O'CALLAHAN* AND *RELFORD*.**

Some improvements have taken place in the military justice system since *O'Callahan* was decided,<sup>18</sup> however, the military justice system does not, and perhaps can not provide the two essential safeguards considered most significant by this Court in *O'Callahan*; grand jury indictment and trial by jury. Moreover, unlike Article III courts, the presiding officer in a court-martial is not a judge whose "objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition." *O'Callahan v. Parker*, 395 U.S. at 264.

Tampering with the delicate balance so vital to the fair administration of criminal justice continues to plague the military justice system despite repeated efforts to eradicate the problem.<sup>19</sup> As this Court so aptly stated, "military tribunals have not been and probably never can be con-

<sup>18</sup> Most of the improvements were accomplished by the passage of the Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335. These changes were apparently not considered significant enough by this Court to overrule *O'Callahan* when *Schlesinger v. Councilman*, *supra*, was decided seven years after the Act was passed into law.

<sup>19</sup> Military courts "have always been subject to varying degrees of 'command influence'." *Reid v. Covert*, 354 U.S. at 36. Since *O'Callahan* was decided, federal and military courts have been confronted with recurring instances of unlawful command influence. *See generally*, *Homey v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971); *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979). These attempts to impermissibly influence trials call into question the integrity of the military judicial system itself. The issue of unlawful command influence of military commanders upon the integrity of the military judicial system is again being litigated in military appellate courts. *See, e.g.*, *United States v. Yslava*, 18 M.J. 670 (A.C.M.R. 1984), *pet. granted*, 19 M.J. 281 (C.M.A. 1985); *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985), *pet. granted*, \_\_\_\_ M.J. \_\_\_\_ (C.M.A. 1986).

stituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles*, 350 U.S. at 17.

The interests the military seeks to vindicate in its courtrooms remain substantially unchanged since the *O'Callahan* decision. Furthermore, there has been no dramatic change in the capability or interest of civilian jurisdictions in prosecuting and punishing criminals. Notwithstanding the conclusion of the court below, the military judicial system is no better equipped to protect the rights of victims than state and federal courts. The expansive approach the Court of Military Appeals has taken toward military jurisdiction in this and other recent cases cannot logically be justified by significant developments in military or civilian society. There is simply no cogent or compelling reason for the court below to depart from the decisions of this Court that military courts are subordinate to civilian courts and should be used only when required by military necessity.

**C. THE ISSUE IN THIS CASE IS SUBSTANTIAL AND MERITS THE INTERVENTION OF THIS COURT.**

The issue in this case is significant and necessitates this Court's intervention at this interlocutory stage of petitioner's court-martial. The issue presented was fully litigated at trial and at both the Coast Guard Court of Military Review and the Court of Military Appeals prior to their decisions being rendered. *Cf. Schlesinger v. Councilman*, *supra*. The petitioner has exhausted his military remedies and will suffer serious harm if this Court allows the decision below to stand. The right of the military accused to appeal to this Court is completely dependent on the Court of Military Appeal's exercise of its discretionary review powers.<sup>20</sup> The petitioner could be deprived of an opportunity to present the significant issues in this case to this Court for appropriate resolution at a later stage if the court below denies the petition for grant of review.<sup>21</sup> Moreover denial of certiorari will have conse-

<sup>20</sup> 10 U.S.C. § 867(h)(1)(Supp. III 1985).

<sup>21</sup> If no other issue exists in the case, it is quite possible that the court below will not exercise its discretionary review power because it has



quences which transcend this case. The broad strokes painted by *Solorio* and other recent cases set a dangerous precedent which will discourage service courts of review and military trial courts from making the constitutionally required detailed analysis of the *Relford* factors to "the precise set of facts in which the offense has occurred." *Schlesinger v. Councilman*, 420 U.S. at 760.<sup>22</sup> Thus, numerous other servicemen will face a risk of being improperly subjected to court-martial prosecution if the decision in the case is allowed to stand.

### CONCLUSION

The decision in this case constitutes an unwarranted and unconstitutional extension of court-martial jurisdiction which vitiates the limits set forth by this Honorable Court in *O'Callahan* and *Relford*, and transcends the outer boundaries established by the court's initial decisions. The expansion of military jurisdiction beyond its proper domain is not justified by changes in society, improvements in the military justice system, or any other persuasive rationale. This Court should reaffirm the principles set forth in *O'Callahan* and hold that

previously considered the jurisdictional issue. Further, if the court grants on an unrelated issue, the petitioner may be precluded from litigating the jurisdiction issue.

<sup>22</sup> Indeed, this has already taken place in one case where the Army Court of Military Review stated that in light of *Solorio*, "a detailed application of the *O'Callahan* and *Relford* factors is unnecessary to resolve the jurisdictional issue." *United States v. Stover*, SPCM 21611, slip op. at 3 (A.C.M.R. 26 Feb. 1986). (unpub.) (Appendix B).

the constitutional rights of those who serve our country in uniform will not be sacrificed on the altar of current societal trends.

Respectfully submitted,

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## APPENDICES

APPENDIX A

UNITED STATES ARMY COURT  
OF MILITARY REVIEW

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Miscellaneous Docket No. 1986/1

UNITED STATES, APPELLANT

*v.*

STAFF SERGEANT RANDY W. J. ABELL, 516-72-8041,  
UNITED STATES ARMY, APPELLEE

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11 March 1986

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Before YAWN, WILLIAMS, and KENNETT, Appellate  
Military Judges

For Appellant: Colonel James Kucera, JAGC, Lieutenant  
Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel  
Joseph A. Rehyansky, JAGC (on brief).

For Appellee: Colonel Brooks B. La Grua, JAGC, Lieu-  
tenant Colonel William P. Heaston, JAGC, Major Eric T.  
Franzen, JAGC, Captain David W. Sorensen, JAGC (on  
brief).

MEMORANDUM OPINION

Per Curiam:

Pursuant to Article 62, Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 862 (Supp. I 1983), and in accordance with Rule for Courts-Martial 908, Manual for Courts-Martial, United States, 1984, the government appeals the trial judge's ruling that the military lacks subject matter jurisdiction over the offenses alleged in the case.

(1a)



Appellee was arraigned at a general court-martial at Fort Rucker, Alabama, on three specifications alleging indecent acts with children under the age of 16 years, violations of Article 134, UCMJ. The facts show, *inter alia*, the alleged offenses occurred in appellee's trailer at a trailer court in Daleville, Alabama. The trailer court is located adjacent to Fort Rucker, separated from the installation by a railroad track, but six to eight miles from the main cantonment. Each of the alleged victims were dependents of soldiers and resided in the same trailer court as did the accused. Approximately 80 percent of the residents of this trailer court consisted of soldiers and their dependents. No evidence was presented, however, showing any contact or activity between the appellee and the alleged victims or their military fathers occurring on Fort Rucker.

Having reviewed the record and carefully considered briefs filed by both the government and the appellee, we conclude that the offenses alleged are "service connected" and that the military judge erred by dismissing them for lack of subject matter jurisdiction. *United States v. Solorio*, 21 M.J. 251 (CMA 1986).

The appeal of the United States pursuant to Article 62, UCMJ, is granted. Accordingly, the ruling of the military judge dismissing the charge and specifications is vacated, and the record will be returned to the military judge for action not inconsistent with this opinion.

For the Court:

/s/ WILLIAM S. FULTON, JR.  
William S. Fulton, Jr.  
*Clerk of Court*

## APPENDIX B

### UNITED STATES ARMY COURT OF MILITARY REVIEW

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SPCM 21611

UNITED STATES, APPELLEE

*v.*

PRIVATE (E-2) FLOYD F. STOVER, 378-84-3384,  
UNITED STATES ARMY, APPELLANT

---

26 FEBRUARY 1986

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Before RABY, CARMICHAEL, and ROBBLEE, Appellate Military Judges

For Appellant: Lieutenant Colonel Arthur L. Hunt, JAGC, Captain Martin B. Healy, JAGC, Captain Pamela G. Montgomery, JAGC (on brief).

For Appellee: Colonel James Kucera, JAGC, Lieutenant Colonel Adrian J. Gravelle, JAGC, Major Byron J. Braun, JAGC, Captain John F. Burnette, JAGC (on brief).

### MEMORANDUM OPINION

CARMICHAEL, Judge:

Pursuant to his pleas, appellant was convicted of negligently destroying a military vehicle, operating the same vehicle in a reckless manner, and assaulting another servicemember, in violation of Articles 108, 111, and 128, Uniform Code of Military Justice, 10 U.S.C. §§ 908, 911, and 928 (1982), respectively. His sentence to a bad conduct discharge, four months confinement, forfeiture of \$400.00 pay per month for six months, and reduction to Private (E-1) was approved by the convening authority.

Appellant makes the same arguments before this court that he advanced at trial. First, he contends that the offenses of destroying a military vehicle and operating the same vehicle in a reckless manner are multiplicitious for findings. Second, he challenges his assault convictions on the theory that it is not service connected, and thus not subject to court-martial jurisdiction. We find both arguments unpersuasive.

At trial the military judge ruled that appellant's reckless operation and subsequent destruction of a military vehicle were properly charged as separate offenses and were not multiplicitious for findings. He did, however, treat the two offenses as multiplicitious for sentencing. We agree with the judge's rulings. Neither of the charged offenses is a lesser offense of the other; each alleges an aggravating circumstance which is not a necessary element of the other and is not alleged in the other; and each violates a different societal norm. See *United States v. Williams*, 19 M.J. 959 (ACMR 1985) (drunk driving offense including aggravating circumstance not multiplicitious for findings with offense of negligent destruction of military property despite unity of time and place); see also *United States v. DiBello*, 17 M.J. 77 (CMA 1983) (unauthorized absence of extended duration not multiplicitious for findings with breach of restriction because extended duration sufficient to make absence separate and distinct).

Appellant contended at his trial and does again before this court that the military lacked subject matter jurisdiction over the aggravated assault offense of which he was convicted. The offense occurred at a civilian bar approximately ten miles from the post where appellant was stationed. The victim of the assault was another servicemember. At the time of the assault both appellant and the victim were dressed in civilian clothes. The bar was frequented by servicemembers during nonduty hours, and numerous servicemembers were present when appellant physically attacked the victim. Although appellant did not know the victim prior to assaulting him, he had heard that the victim was a servicemember. Also, he believed the victim to be a servicemember because of his short haircut.

If a military accused commits an offense beyond the boundaries of the military enclave, then a court-martial's subject matter jurisdiction over that offense is dependent on a showing that it is service connected. *Relford v. Commandant*, 401 U.S. 355 (1971); *O'Callahan v. Parker*, 395 U.S. 258 (1969). Whether or not a particular off-post offense is service connected must be determined on a case-by-case basis, applying the factors set forth by the United States Supreme Court in *O'Callahan* and *Relford*. In applying these factors, we are guided by the words of Chief Judge Everett of the United States Court of Military Appeals:

However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (CMA 1980), which concerned off-base drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience.

In so holding, we were not trying to rewrite the Supreme Court's opinion in *O'Callahan*. Instead, we sought to apply *O'Callahan* – as amplified by *Relford* – to conditions as they now exist. *Our premise was that O'Callahan permitted us to consider later developments in the military community and in the society at large and to take into account any new information that might bear on service-connection.*

*United States v. Solorio*, 21 M.J. 251, 254 (CMA 1986) (footnote omitted) (emphasis added).

Appellant committed an aggravated assault upon an individual whom he believed to be a servicemember. He struck the victim with his fists, kicked him, and struck him with a beer bottle. The injuries that he inflicted resulted in the victim being kept in a military hospital for two days and being absent from his duty station for one half a day. Other servicemembers who were present at the civilian bar when the assault occurred knew that appellant and the victim were both servicemembers. This knowledge, as well as widespread knowledge of the incident on post, served to make appellant an "outcast" in his squad, platoon, and company. He was ostracized by other servicemembers in his unit, several of

whom apparently wanted to avenge the victim. Appellant's misconduct generated command interest and an administrative investigation under Army Regulation 15-6<sup>1</sup> was directed. One of its purposes, according to a senior noncommissioned officer from appellant's unit, was to determine "why we [unit leaders] don't know what the soldiers are doing after duty hours."

Based on the facts before us, a detailed application of the *O'Callahan* and *Relford* factors is unnecessary. We find that the evidence conclusively establishes that appellant's misconduct had a significant and highly detrimental impact on military discipline, unit morale, and unit cohesiveness and effectiveness; the military had a distinct and overriding interest in deterring off-post assaults of this nature; and, that the military's interest could not have been adequately addressed by a civilian court. See *United States v. Lockwood*, 15 M.J. 1, 4 (CMA 1983), citing *Schlesinger v. Councilman*, 420 U.S. 738, 759-60 (1975). Accordingly, appellant's off-post assault of another servicemember was service connected and subject to trial by court-martial.<sup>2</sup>

We also note that appellant was convicted of two other offenses where service connection was not an issue. Although "pendent jurisdiction" is a concept which has never been

<sup>1</sup> Army Regulation 15-6, Boards, Commissioners, and Committees: Procedure for Investigating Officers and Boards of Officers (C1, 15 Jun. 1981).

<sup>2</sup> Both the trial counsel, Captain Paul Koch, and the defense counsel, First Lieutenant Kevin Sugg, are to be commended for their excellent in-court presentations on the issue of service connection. Not only did they make persuasive, well-reasoned arguments in support of their respective positions, but they also provided the military judge with clear, concise briefs which summarized significant civilian and military decisions in the area of service connection. Captain Koch called four witnesses in developing the government's theory on why the charged assault was service connected, and Lieutenant Sugg called one witness, introduced a stipulation of expected testimony, and had appellant testify in an effort to show that the requisite service connection was lacking. While this ostensibly was a simple

directly embraced by the United States Court of Military Appeals, see *Lockwood*, 15 M.J. at 7, the advantages to an accused of disposing of all charges at a single trial have been recognized. *Id.* at 7-8; *United States v. Solorio*, 21 M.J. at 251-52. In this case appellant's assault is unlike the other offenses which he committed, but does bear a relationship to them in time and place. Given the military's interest in disposing of all known offenses at a single trial—an interest presumably shared by an accused—and the advantages to both the military and an accused of having offenses tried expeditiously, these considerations provide additional support for finding an off-base offense to be service connected.<sup>3</sup> "Under these circumstances, there exists . . . 'a military interest in having all the offenses tried by court-martial, so that they can be disposed of together without delay,' and 'this interest, in turn, helps provide a basis for finding service connection for the off-base offenses.'" *United States v. Solorio*, 21 M.J. at 258.

guilty plea case, counsel recognized that it involved an other than simple interlocutory question and prepared accordingly. Because of their professionalism, this court was able to decide the issue with all the relevant facts before it.

<sup>3</sup> We recognize that some support can be found in military decisional law for the principle that service connection exists whenever a servicemember is the victim of an off-post offense. The argument is made that the victim's status generates the requisite military significance, and thus any reference to the various other *O'Callahan* factors is unnecessary. See, e.g., *United States v. Hedlund*, 2 M.J. 11, 15-16 (CMA 1976) (Cook, J., dissenting); *United States v. Erverson*, 41 CMR 70, 71 (CMA 1969). However, we believe that the Court of Military Appeals' most recent decision in the area of subject matter jurisdiction continues the requirement for an analysis of the *O'Callahan* and *Relford* criteria in resolving the service connection issue. *United States v. Solorio*, 21 M.J. at 255-57. Thus, we will wait for an appropriate case in which the sole service connection factor is that the victim was a servicemember to decide whether the victim's military status standing alone is sufficient to establish that an offense is service connected.



8a

The findings of guilty and the sentence are affirmed.  
Senior Judge RABY and Judge ROBBLEE concur.

For the Court:

/s/ WILLIAM S. FULTON, JR.  
William S. Fulton, Jr.  
*Clerk of Court*

4  
No. 85-1581

Supreme Court, U.S.

FILED

APR 25 1986

JOSEPH E. SPANIOLO, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

RICHARD SOLORIO  
Yeoman, First Class, U.S. Coast Guard,  
*Petitioner,*  
v.  
UNITED STATES OF AMERICA  
*Respondent.*

**Petition For A Writ Of Certiorari To The United States  
Court Of Military Appeals**

**BRIEF OF THE APPELLATE DEFENSE DIVISION  
UNITED STATES NAVY-MARINE CORPS APPELLATE  
REVIEW ACTIVITY AS AMICUS CURIAE IN SUPPORT  
OF THE PETITION FOR A WRIT OF CERTIORARI**

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**QUESTIONS PRESENTED**

1. Whether retroactive judicial expansion of court-martial jurisdiction violates due process of law?
2. Whether the victim's dependent status, without more, is sufficient service-connection to establish court-martial jurisdiction?



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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

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**No. 85-1581**

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RICHARD SOLORIO  
Yeoman First Class, U.S. Coast Guard  
*Petitioner,*

v.

UNITED STATES OF AMERICA  
*Respondent.*

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**Petition For a Writ Of Certiorari To The United  
States Court Of Military Appeals**

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**BRIEF OF THE APPELLATE DEFENSE  
DIVISION UNITED STATES NAVY-MARINE  
CORPS APPELLATE REVIEW ACTIVITY  
AS AMICUS CURIAE IN SUPPORT OF THE  
PETITION FOR A WRIT OF CERTIORARI**

---

Petitioner and Respondent have consented to the submission of this amicus curiae brief by the Appellate Defense Division in support of petitioner. Copies of the consents have been filed with the Court.

## INTEREST OF THE APPELLATE DEFENSE DIVISION

The Appellate Defense Division represents convicted members of the Naval Service before the U.S. Navy-Marine Corps Court of Military Review, the U.S. Court of Military Appeals, and the U.S. Supreme Court. This representation is provided for by Article 70, Uniform Code of Military Justice, 10 U.S.C § 870 (1982).

The Appellate Defense Division is the principal source of representation for all Navy and Marine Corps members sentenced to a punitive discharge or more than one year's confinement. The decision of the court below is an unprecedented and unconstitutional expansion of court-martial jurisdiction. If allowed to stand, that decision will have an adverse impact on Navy and Marine Corps personnel by depriving them of the fundamental rights protected by civilian courts.

### STATEMENT OF THE CASE

The facts are cogently and completely set out in the petition. Essentially, petitioner was charged with committing various sex offenses with two young girls. Some of the alleged offenses occurred while petitioner was stationed in Juneau, Alaska, while the others allegedly occurred after petitioner was transferred to Governors Island, New York. The court-martial was convened at Governors Island. At trial the defense successfully moved to dismiss the charges relating to the Alaska offenses for lack of subject-matter jurisdiction. The Government appealed pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C.A. §

862 (West Supp. 1984). The U.S. Coast Guard Court of Military Review reversed the military judge. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). Petitioner appealed to the U.S. Court of Military Appeals which affirmed the lower court's decision. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986). Petitioner was subsequently convicted of eight offenses committed in Alaska.

## ARGUMENT

### I

#### THE SUBSTANTIAL IMPACT OF THE DECISION BELOW AND THE NATURE OF MILITARY APPELLATE REVIEW MERIT THE INTERVENTION OF THIS COURT

The decision of the court below represents a judicial expansion of court-martial jurisdiction. Before this decision, the dependent status of the victim, without more, was not enough to establish service-connection. The decision below changed that position, not only for petitioner, but for every servicemember similarly accused.

Every member of the military, including the U.S. Navy, U.S. Army, U.S. Air Force, U.S. Marine Corps, and the U.S. Coast Guard will be affected by the lower court's decision. The U.S. Court of Military Appeals reviews cases from all the services. Consequently, decisions of that court are binding on every servicemember. If allowed to stand, the decision below will adversely impact not only on petitioner and other members of the Coast Guard but on every member of the Armed Forces. A significant number of individuals face the deprivation of the rights protected



by civilian courts but not available to individuals facing trial by court-martial.

In addition, given the nature of military appellate review, intervention of this Court at this time is appropriate. As stated above, petitioner was convicted of eight offenses committed in Alaska, and the case will be automatically reviewed by the U.S. Coast Guard Court of Military Review. Uniform Code of Military Justice, Art. 66, 10 U.S.C. § 866 (1982). Review by the U.S. Court of Military Appeals, however, is discretionary. Uniform Code of Military Justice, Art. 67, 10 U.S.C. § 867 (1982). Petitioner must petition that court for review of his court-martial. *Id.* Because petitioner may only seek this Court's review if the U.S. Court of Military Appeals grants review, this may be the only opportunity for this Court to review petitioner's case.

The issue here is ripe for review by this Court. The subject-matter jurisdiction issue was fully litigated at the trial level, and was fully discussed by both military appellate courts. All the facts necessary for disposition of the issue are set forth in the petition. The subsequent trial on the merits did not reveal any new matter relevant to the subject-matter jurisdiction issue. Because the issue has been fully developed below, and given the uncertainty of another opportunity to petition this Court, the petition for a writ of certiorari should be granted this time.

## II

### DUE PROCESS OF LAW PROHIBITS RETROACTIVE JUDICIAL EXPANSION OF COURT- MARTIAL JURISDICTION.

In *Bowie v. City of Columbia*, 378 U.S. 347 (1964), this Court held that an unforeseeable and retroactive judicial expansion of statutory language violates due process. *Bowie* at 352. The principle announced in *Bowie* is applicable to petitioner's case.

This Court first announced the service-connection test for determining court-martial jurisdiction in *O'Callahan v. Parker*, 395 U.S. 258 (1969). That test was applied by this Court in *Relford v. Commandant*, 401 U.S. 355 (1971). Subsequent to the *O'Callahan* decision, the U.S. Court of Military Appeals decided several cases with facts similar to those of the current petition. In applying the service-connection test, the court below has repeatedly held that dependent status of the victim, without more, is an insufficient basis for court-martial jurisdiction. *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). The court below, however, ignored its own precedents and held that the dependent status of the victim is now sufficient basis for court-martial jurisdiction. In essence, an offense which prior to petitioner's case could not be tried by court-martial can now be prosecuted by the military.

The lower court's expansion of court-martial jurisdiction to offenses involving military dependents was

unforeseeable. Although the court below has expanded court-martial jurisdiction before, those cases involved illegal drugs. See *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Smith*, 9 M.J. 359 (C.M.A. 1980); *United States v. Norman*, 9 M.J. 355 (C.M.A. 1980); *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980). The specific language of the lower court in those cases indicates that its expansion was limited to drug offenses. In *Trottier*, the court stated that offenses involving drugs have a special effect on the military and combat readiness that other offenses do not. *Trottier* at 346 n.22. Thus, while court-martial jurisdiction has gradually expanded with respect to drug offenses, basing jurisdiction on the status of the victim was unforeseeable and without warning.

Even if the ruling of the lower court is correct, its retroactive application to petitioner is a violation of due process. When the alleged offenses were committed, petitioner was subject only to prosecution in civilian court. He was guaranteed indictment by grand jury and trial by a petit jury of his peers. Without warning, the lower court reinterpreted the concept of service-connection and retroactively applied its new expanded test to petitioner. That retroactive application was unforeseeable and deprived petitioner of due process of law.

### III

#### THE DEPENDENT STATUS OF THE VICTIM, WITHOUT MORE, IS INSUFFICIENT SERVICE- CONNECTION TO ESTABLISH COURT-MARTIAL JURISDICTION.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), this Court first set forth the service-connection test for

determining court-martial jurisdiction. *O'Callahan* was a U.S. Army soldier convicted of various offenses committed off base in a leave status. The victim was a civilian with no military connections. This Court held that while the status of the offender as a servicemember is necessary for court-martial jurisdiction, it is not dispositive. *O'Callahan* at 267. There must also be a showing that the offense is service-connected. *Id.* at 272. The *O'Callahan* Court analyzed the facts in light of several factors<sup>1</sup> and determined that the offenses were not service-connected. *Id.* at 273.

The *O'Callahan* Court recognized that military courts do not provide the constitutional safeguards essential to civilian courts. *Id.* at 262-63. The nature of military discipline, however, necessitates a limited system of military courts. *Id.* at 261. Those courts are excepted from the constitutional protections guaranteed by civilian courts. *Id.* The Court determined that because military courts lack specific constitutional protections their jurisdiction extends only to those offenses that are service-connected. *Id.*

In *Relford v. Commandant* 401 U.S. 355 (1971), the Court applied the service-connection test to a U.S. Army corporal who committed various offenses against two females. One of the victims was the sister of a servicemember and the other was a servicemember's wife. All of the offenses occurred on military installations. *Relford* at 360. Based on an application

<sup>1</sup> The factors considered by the *O'Callahan* Court were: the petitioner's proper absence from the base, the commission of the offenses off base, the civilian status of the victim, the absence of military control over the location of the offenses and the availability of civilian courts to prosecute. *O'Callahan* at 273.



of the *O'Callahan* factors, the *Relford* Court held that the offenses were service-connected.<sup>2</sup> *Id.* at 365.

In petitioner's case, the trial judge applied the factors enunciated by the *Relford* Court. After announcing his findings, the judge ruled that the offenses allegedly committed by petitioner in Alaska were not service-connected. *United States v. Solorio*, 21 M.J. at 252. In affirming the intermediate appellate court's reversal, the court below reanalyzed the facts and held that the offenses were service-connected. *Solorio*, 21 M.J. at 258.

The lower court found sufficient service-connection simply on the basis that child sexual abuse has an impact on the military. *Solorio*, 21 M.J. at 255-57. Two points need be made here. First, any offense committed by a servicemember has some impact upon his service. At the very least, the military is deprived of his services while he is prosecuted and serving sentence and it casts the military in a bad light when his uniformed status is exposed. However, to use such

<sup>2</sup> The *Relford* Court enunciated the following factors: 1) the serviceman's proper absence from the base; 2) the crime's commission away from the base; 3) its commission at a place not under military control; 4) its commission within our territorial limits and not in an occupied zone of a foreign country; 5) its commission in peacetime and its being unrelated to authority stemming from the war power; 6) the absence of any connection between the defendant's military duties and the crime; 7) the victim's not being engaged in the performance of any duty relating to the military; 8) the presence and availability of a civilian court in which the case can be prosecuted; 9) the absence of any flouting of military authority; 10) the absence of any threat to a military post; 11) the absence of any violation of military property; 12) the offense's being among those traditionally prosecuted in civilian courts. *Relford* at 356.

a basis would truly destroy this Court's binding decisional law in *O'Callahan* and *Relford*. The lower court may not eradicate the limitations on court-martial jurisdiction that this Court has left intact.

Second, the court's attempt to carve out a special jurisdictional niche for child sexual abuse in terms of the psychological effect on the victim and the attendant impact on the military is unsound. The same can be done for any serious crime perpetrated on a military dependent. Surely, the psychological impact of murder, or of any violent crime against a dependent on the military member, and in turn, on the military, is just as severe. Today the tragedy of child sexual abuse is topical; tomorrow, another may take its place. "Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies." *United States ex rel. Hirshberg v. Cooke*, 336 U.S. 210 at 214 (1949).

In addition, there is no indication that the civilian justice system is any less interested in or is any less capable of protecting the rights of victims than is the military justice system. The Coast Guard has been completely satisfied with the treatment of similar cases by the Alaskan courts. *Solorio*, 21 M.J. at 518. In petitioner's case the Alaskan authorities were willing and able to prosecute, but merely deferred to the military. *Solorio*, 21 M.J. at 515. The military justice system, however, has not changed to the extent that it provides the constitutional protections of indictment by grand jury and trial by petit jury.

A detailed analysis of the *Relford* factors to the facts in petitioner's case is set forth in the petition. That analysis reveals that the offenses were not service-connected. A victim's status as a military de-



pendent, without more, is simply insufficient service-connection to establish court-martial jurisdiction.

### CONCLUSION

This case involves an issue of significant importance to every member of the Armed Services. If allowed to stand, the lower court's unconstitutional judicial expansion of court-martial jurisdiction will go unchecked. Ultimately, a separate military justice society would be created, prosecuting individuals without constitutional protections, regardless of any military interest.

Respectfully submitted,

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(6)  
No. 85-1581

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JUL 24 1988

JOSEPH F. SPANIOLO, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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RICHARD SOLORIO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

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**ON A WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF MILITARY APPEALS**

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**JOINT APPENDIX**

---

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---

**Petition for Certiorari Filed March 26, 1986**  
**Certiorari Granted June 16, 1986**

20428

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**In the Supreme Court of the United States**

OCTOBER TERM, 1985

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No. 85-1581

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RICHARD SOLORIO, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

---

**ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF MILITARY APPEALS**

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**CHRONOLOGICAL LIST OF  
RELEVANT DOCKET ENTRIES**

May 21, 1985—Charges and specifications against petitioner referred to trial by general court-martial.

May 28, 1985—Petitioner's motion to dismiss Alaska charges and specifications because of a lack of court-martial subject-matter jurisdiction filed.

June 3, 1985—General court-martial commenced.

June 4, 1985—Trial judge granted petitioner's motion to dismiss the Alaska charges and specifications.

June 5, 1985—Government filed its notice of appeal.

July 5, 1985—Government filed its brief in support of its appeal from the trial judge's ruling at the Coast Guard Court of Military Review.

July 25, 1985—Petitioner filed his answering brief.

August 7, 1985—Hearing by the Coast Guard Court of Military Review on the Government's appeal.

September 24, 1985—Opinion and judgement of the Coast Guard Court of Military Review granted the Government's appeal and reversed the decision of the trial judge.

October 10, 1985 - Petitioner filed petition for grant of review at the Court of Military Appeals.

October 25, 1985 - Petitioner filed brief in support of his petition for grant of review.

November 15, 1985 - Government filed its answer in opposition.

November 19, 1985 - Hearing by Court of Military Appeals on petition for grant of review.

January 27, 1986 - Order granting the petition for grant of review, and opinion and judgment of the Court of Military Appeals affirming the decision of the Coast Guard Court of Military Review.

February 7, 1986 - Mandate issued.

IN THE  
UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53603/CG

CMR Misc. Dkt. No. 004-85

UNITED STATES, APPELLEE

*v.*

RICHARD SOLORIO (549-04-2211), APPELLANT

Notice is hereby given that a petition for grant of review was filed under Rule 20 on this 10th day of October, 1985.

Appellant will file a supplement to the petition in accordance with Rule 21 on or before the 12th day of November, 1985.

For the Court,

/s/ JOHN A. CUTTS, III

*Deputy Clerk of the Court*

cc: The General Counsel, Department of Transportation  
Appellate Defense Counsel  
Appellate Government Counsel

IN THE  
UNITED STATES COURT OF MILITARY APPEALS

CGCMR Misc. Dkt. No. 004-85  
USCMA Docket No. 53603 [For Court use only]

UNITED STATES, APPELLEE

*v.*

RICHARD SOLORIO (549-04-2211), Yeoman First Class (E-6),  
U.S. Coast Guard, USCG Group, New York, N.Y.  
APPELLANT

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ARTICLE 62 PETITION FOR GRANT OF REVIEW

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TO THE JUDGES OF THE UNITED STATES COURT  
OF MILITARY APPEALS:

1. I hereby petition the Court for review, pursuant to RCM 908, of the decision of the Coast Guard Court of Military Review on the Government's appeal from dismissal of charges and specifications in the captioned case.

2. I understand that, unless I specifically request the contrary, a military lawyer will be designated by the General Counsel, Department of Transportation, to represent me free of charge before the U.S. Court of Military Appeals.

SIGNED: /s/ RICHARD SOLORIO

DATED: 8 October 1985

MAIL TO: U.S. Court of Military Appeals  
450 E. Street, N.W.  
Washington, D.C. 20442

IN THE  
UNITED STATES COURT OF MILITARY APPEALS

USCMA Dkt. No. 53603/CG  
CMR Misc. Dkt. No. 004-85

UNITED STATES, APPELLEE

*v.*

RICHARD SOLORIO (549-04-2211), APPELLANT

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ORDER

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Because no petition for reconsideration has been filed within the period prescribed by Rule 31(a) of the Rules of Practice and Procedure, United States Court of Military Appeals, it is by the Court this 7th day of February 1986,

ORDERED:

That this Court's opinion in the above-entitled case (21 M.J. 251) is now final.

For the Court,

/s/ JOHN A. CUTTS, III  
*Deputy Clerk of the Court*

cc: The General Counsel, Department of Transportation  
Appellate Defense Counsel (BRUCE)  
Appellate Government Counsel (DONLON)



BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER THIRD COAST GUARD DISTRICT,  
GOVERNORS ISLAND, NEW YORK

Charges, Specifications and Jurisdictional Statements  
Referred to Trial, May 21, 1986

CHARGE I, VIOLATION OF THE UCMJ, ARTICLE 134

Specification 1: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, during the period 4-5 January 1985 take indecent liberties with Melissa Carney, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Quartermaster Second Class Steven Carney, USCG, by exposing his genitals to her, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 2: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, at diverse times during the period from about 20 November to about 31 December 1984 take indecent liberties with Melissa Carney, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Quartermaster Second Class Steven Carney, USCG, by exposing his genitals to her, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 3: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, during the period from about 20 November 1984 to about 5 January 1985 take indecent liberties with Melissa Carney, a female under the age of 16 years not the wife of the said Solorio and

dependent daughter of Quartermaster Second Class Steven Carney, USCG, by pulling his underwear partially down to his abdomen to show her his operative scar, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 4: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, during the period from about 20 November to about 31 December 1984 commit lascivious acts upon the body of Melissa Carney, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Quartermaster Second Class Steven Carney, USCG, by laying on top of her and licking her on the neck, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 5: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, during the period from about 20 November 1984 to about 5 January 1985 commit indecent acts upon the body of Melissa Carney, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Quartermaster Second Class Steven Carney, USCG, by holding her with his hand on her genital area when throwing her on a bed with intent to gratify the lust and sexual desires of the said Solorio.

Specification 6: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, during the period from about 26 November 1984 to about 4 January 1985 take indecent liberties with Melissa Carney, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Quartermaster Second Class Steven Carney, USCG, by showing a video-taped movie which included male and female frontal nudity and sexual intercourse

with the intent to gratify the lust and sexual desires of the said Solorio.

Specification 7: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, at U.S. Coast Guard Support Center, Governors Island, New York, New York, at or near Building 866, Apartment 4-B, during the period 4-5 January 1985 take indecent liberties with Jennifer Scott, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Electricians Mate First Class Thomas Scott, USCG, by exposing his genitals to her, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 8: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1983 to about 30 June 1983 commit lascivious acts upon the body of Amber L. Johnson, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by touching her in her genital area with his genital area while the said Solorio and Amber L. Johnson were fully clothed, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 9: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1983 to about 30 June 1983 commit lascivious acts upon the body of Amber L. Johnson, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by taking her hand and placing it on his genital area, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 10: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New

York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1983 to about 30 June 1983 commit lascivious acts upon the body of Amber L. Johnson, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by taking her hand with his hand and placing her hand upon her genital area, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 11: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1983 to about 30 June 1983 commit lascivious acts upon the body of Amber L. Johnson, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by showing her adult magazines depicting frontal nudity and explicit sexual activity, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 12: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1983 to about 5 June 1983 commit lascivious acts upon the body of Jennifer L. Grantz, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Yeoman Second Class Frank Grantz, USCG, by placing his hand underneath her slacks and fondling her buttocks and genital area, with intent to gratify the lust and sexual desires of the said Solorio.



## CHARGE II, VIOLATION OF ARTICLE 128, UCMJ

Specification 1: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1982 to about 25 March 1983 unlawfully touch and fondle Amber L. Johnson, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by placing his hand on her genital area.

Specification 2: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1982 to about 25 March 1983 unlawfully touch and fondle Amber L. Johnson, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by rubbing his genital area against her genital area while both parties were clothed.

Specification 3: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1982 to about 25 March 1983 unlawfully touch and fondle Amber L. Johnson, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by taking her hand and placing it on his genital area.

Specification 4: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska,

at divers times during the period from about 26 March 1982 to about 25 March 1983 unlawfully touch and fondle Amber L. Johnson, a female under the age of 16 years not the wife of the said Solorio and dependent daughter of Chief Warrant Officer (W-2) Larry V. Johnson, USCG, by taking her hand and placing it on her genital area.

Specification 5: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 26 March 1982 to about 25 March 1983 unlawfully touch and fondle Jennifer L. Grantz, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Yeoman Second Class Frank Grantz, USCG, by placing his hand in her slacks and fondling her buttocks and genital area.

## ADDITIONAL CHARGE: I, VIOLATION OF THE UCMJ, ARTICLE 80

Specification: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 1 August 1983 to about 30 June 1984, attempt to rape Jennifer L. Grantz, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Yeoman Second Class Frank Grantz, USCG.

## ADDITIONAL CHARGE: II, VIOLATION OF THE UCMJ, ARTICLE 134

Specification 1: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau Alaska at 8916 Birch Lane, Juneau, Alaska,



at divers times during the period from about 3 April 1983 to about 30 June 1984, take indecent liberties with Jennifer Grantz, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Yeoman Second Class Frank Grantz, USCG, by showing her and allowing her to look at adult magazines depicting frontal nudity and explicit sexual activity and reading sexually oriented jokes and stories to her, with intent to gratify the lust and sexual desires of the said Solorio.

Specification 2: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 1 August 1983 to about 30 June 1984, commit an indecent assault upon Jennifer Grantz, a female under the age of 16 not the wife of the said Solorio and dependent daughter of Yeoman Second Class Frank Grantz, USCG, by removing her shorts and panties with the intent to gratify the lust and sexual desires of the said Solorio.

#### JURISDICTIONAL STATEMENT FOR CHARGE I SPECIFICATION 10-15 AND CHARGE II

The accused is an active duty member of the Coast Guard. The victims are dependents of active duty members of the Coast Guard. The specifications describe indecent liberties and lascivious acts with the dependent daughters of Coast Guard members that were fostered by the trust and friendship that is engendered and encouraged among Coast Guard families living in off-base locations in Juneau, Alaska. The housing area near accused's housing at Birch Lane, Juneau, Alaska is a popular housing area for Coast Guard personnel with over 12 Coast Guard families in the immediate vicinity. Such indecent liberties and lascivious acts destroy this trust and friendship between the accused and the victim's families who are unsure of whom to trust their dependent daughters with. The taking of indecent liberties and lascivious acts by the accused has a direct adverse impact on military discipline

and effectiveness of the victim's family, and has diverted scarce resources of Coast Guard social workers and medical personnel in treating the victims. As such, these off-base offenses of the accused constitute a threat to the effective performance of duty [of] the military members affected and of the commands affected by the charged offense. The charged offenses have a detrimental effect on the reputation and morale of personnel of Coast Guard Support Center New York and Coast Guard commands in Juneau, Alaska. Because of the high mobility of Coast Guard personnel, such charged offenses have a similar effect on personnel at other Coast Guard commands who are aware of the threat to their families posed by child abuse. All of the witnesses presently are assigned within 300 miles of New York City. Because the accused and all victims have been transferred from Juneau, Alaskan authorities are unlikely to prosecute these offenses in civilian courts.

#### JURISDICTIONAL STATEMENT FOR ADDITIONAL CHARGES I AND II

The accused is an active duty member of the Coast Guard. The victim is a dependent of an active duty member of the Coast Guard. The Charges and Specifications describe acts of attempted rape, indecent assault, and indecent liberties with dependent daughter of Yeoman Second Class Frank Grantz, Jennifer Grantz. These acts were fostered by the trust and friendship that is engendered and encouraged among Coast Guard families living in off-base housing in Juneau, Alaska. The housing area near accused's housing in Juneau, Alaska is a popular housing area for Coast Guard personnel with over 12 Coast Guard families in the immediate vicinity. Such indecent acts with female dependent children of Coast Guard members destroy this trust and friendship between the accused and the victims's families who are unsure of whom to trust their dependent daughters with. These acts by the accused have a direct adverse impact on military discipline and effectiveness of the military member of the victim's family, and has diverted scarce resources of Coast Guard Social workers and medical personnel in treating the victims. As

such, these off-base offenses constitute a threat to the effective performance of the military members affected by these acts of violence toward members of the Coast Guard family. The charged offenses have a detrimental effect on the reputation of the Coast Guard and the morale of Coast Guard personnel of the U.S. Coast Guard Support Center New York, U.S. Coast Guard Group New York, and Coast Guard Commands in Juneau, Alaska. Because of the high mobility of Coast Guard personnel, such charged offenses have a similar effect on other Coast Guard commands who are aware of the threat to Coast Guard families posed by child abuse. All of the witnesses are assigned within 300 miles of New York. Because the accused and the victim's family has been transferred from Juneau, Alaska, Alaskan Authorities are unlikely to prosecute these offenses in civilian courts.

#### ADDITIONAL CHARGE: III, VIOLATION OF THE UCMJ, ARTICLE 128

Specification: In that Yeoman First Class Richard Solorio, U.S. Coast Guard, U.S. Coast Guard Group New York, Governors Island, New York, New York did, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska at 8916 Birch Lane, Juneau, Alaska, at divers times during the period from about 1 October 1982 to about 2 April 1983, unlawfully touch Jennifer A. Grantz, a female under the age of sixteen years not the wife of the said Solorio, and dependent daughter of Yeoman Second Class Frank Grantz, USCG, by removing her shorts and panties, laying on top of her, and making back and forth movements with his body.

#### JURISDICTIONAL STATEMENT FOR ADDITIONAL CHARGES I, II, AND III

The accused is an active duty member of the Coast Guard. The victim is a dependent of an active duty member of the Coast Guard. The Charges and Specifications describe acts of attempted rape, indecent assault, and indecent liberties with [the] dependent daughter of Yeoman Second Class Frank

Grantz, Jennifer Grantz. These acts were fostered by the trust and friendship that is engendered and encouraged among Coast Guard families living in off-base housing in Juneau, Alaska. The housing area near accused's housing in Juneau, Alaska is a popular housing area for Coast Guard personnel with over 12 Coast Guard families in the immediate vicinity. Such indecent acts with female dependent children of Coast Guard members destroy this trust and friendship between the accused and the victims's families who are unsure of whom to trust their dependent daughters with. These acts by the accused have a direct adverse impact on military discipline and effectiveness of the military member of the victim's family, and has diverted scarce resources of Coast Guard Social workers and medical personnel in treating the victims. As such, these off-base offenses constitute a threat to the effective performance of the military members affected by these acts of violence toward members of the Coast Guard family. The charged offenses have a detrimental effect on the reputation of the Coast Guard and the morale of Coast Guard personnel of the U.S. Coast Guard Support Center New York, U.S. Coast Guard Group New York, and Coast Guard Commands in Juneau, Alaska. Because of the high mobility of Coast Guard personnel, such charged offenses have a similar effect on other Coast Guard commands who are aware of the threat to Coast Guard families posed by child abuse. All of the witnesses are assigned within 300 miles of New York. Because the accused and the victim's family has been transferred from Juneau, Alaska, Alaskan Authorities are unlikely to prosecute these offenses in civilian courts.



BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD DISTRICT,  
GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Motion to Dismiss Charge I, Specifications 11-15, Charge II,  
Additional Charge I, Additional Charge II, Specifications 1-2,  
and Additional Charge III

Now comes the accused by and through detailed defense counsel and moves that this court dismiss Charge I, Specifications 11 through 15, Charge II, Additional Charge I, Additional Charge II, Specifications 1-2, and Additional Charge III for lack of court-martial jurisdiction over the offenses.

Charge I, Specifications 11 through 15, Charge II, Additional Charge I, Additional Charge II, Specifications 1-2, and Additional Charge III allege sufficient facts for the hearing officer, convening authority and district legal officer to conclude that there is no jurisdiction over the offenses with which the accused is charged since the offenses are not even remotely service connected. The offenses allegedly occurred at 8916 Birch Lane, Juneau, Alaska, a privately owned residence within the territorial limits of the United States, 11 miles from the nearest military installation. The alleged victims, Amber L. Johnson and Jennifer L. Grantz are dependents of a service member but were clearly not engaged in the performance of any duties relating to the military. Finally, the offenses were committed during peacetime and the offenses are clearly among those traditionally prosecuted in civilian courts.

Since Charge I, Specification 11 through 15, Charge II, Additional Charge I, Additional Charge II, Specifications 1-2, and Additional Charge III allege offenses which are not service connected they must be dismissed for lack of court-martial jurisdiction.

/s/ ANDREW M. HOCHBERG  
Andrew M. Hochberg  
LT, USCGR  
Detailed Defense Counsel

(Certificate of Service omitted in printing).

BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD DISTRICT,  
GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Memorandum of Law in Support of Motion to Dismiss

**Statement of Facts**

Yeoman First Class Richard Solorio while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska lived at 8916 Birch Lane, Juneau, Alaska. The residence at 8916 Birch Lane was privately owned by YN1 and Mrs. Solorio and purchased on 1 April 1981. During the entire period in question, 25 March 1982 through 30 June 1983, Chief Warrant Officer Larry V. Johnson and his family lived next door to the Solorio's in a privately owned residence on Birch Lane. The neighborhood consisted entirely of privately owned residences. Aside from YN1 Solorio and CWO2 Johnson, YN1 Solorio knew of only one other Coast Guard member in the neighborhood. During the period in question 25 March 1982 through 5 June 1984, Yeoman Second Class Frank Grantz lived in a privately owned trailer in a trailer park in Juneau, Alaska in a different neighborhood.

During the period of time the Solorio's lived in Juneau, YN1 Solorio was an E-6. His wife Toni Solorio was employed for some time by the United States Forest Service. After leaving the Forest Service, Mrs. Solorio was self employed as a licensed day care operator. Her income producing ability was a significant factor considered by the lender, the First National Bank of Anchorage, in deciding to take a mortgage from the Solorio's. Mrs. Solorio's income was at all times sufficient to cover all or most of the monthly mortgage payments.

CWO2 Johnson and YN1 Solorio became friends as a result of their being next door neighbors. YN1 Solorio became acquainted with Amber Johnson after Amber, and Brian and Manuel Solorio had become friends. Amber would spend time at the Solorio's home and Brian and Manuel would also play at the Johnson residence. Also, the Solorio's would socialize with the Johnson's in their homes. There was no significant contacts between Amber Johnson and YN1 Solorio on a military base or in any Coast Guard facility.



YN2 Frank Grantz and YN1 Solorio became friends as a result of their association with a Juneau's Mens City Basketball League.

They also were associated with each other as President and Treasurer of a youth bowling league in Juneau. YN1 Solorio became acquainted with Jennifer Grantz as a result of his friendship with YN2 Grantz and as a result of Jennifer's friendship with YN1 Solorio's sons. Jennifer also competed on a youth bowling league team and was assigned to the city league soccer team coached by YN1 Solorio. Both youth leagues were sponsored by the city with civilians and Coast Guard dependents participating. There were no significant contacts between Jennifer Grantz and YN1 Solorio on a military base or in any Coast Guard facility.

YN1 Solorio rarely commuted to work with CWO2 Johnson or YN2 Grantz and only worked with YN2 Grantz for about a week near the end of Grantz' tour at CCGD17.

YN1 Solorio has been charged with taking indecent liberties with and committing indecent acts upon Melissa Carney, Jennifer Scott, Amber Johnson and Jennifer Grantz. YN1 Solorio has also been charged with unlawfully touching Amber Johnson and Jennifer Grantz. Only the crimes alleged to have been committed against Melissa Carney and Jennifer Scott occurred on a military base.

**THE ACCUSED'S ALLEGED OFFENSES UNDER THE CIRCUMSTANCES OF THE CASE CONSTITUTE INSUFFICIENT SERVICE CONNECTION TO CONFER COURT-MARTIAL JURISDICTION OVER THE ACTS WHICH TOOK PLACE OFF BASE.**

In order to determine whether an offense committed off-base by a service member is service-connected within the meaning of *O'Callahan v. Parker*, 395 U.S. 258, 89 S.Ct. 1683 (1969), and consequently, whether it is triable by court-martial, the jurisdictional criteria enunciated in *Relford v. Commandant*, 401 U.S. 355, 91 S.Ct. 649 (1971), must be carefully weighed. *United States v. Moore*, 1 M.J. 488 (1976). The issue turns on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and

greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. *Schlesinger v. Councilman*, 420 U.S. 738 at 760, 95 S.Ct. 1300 (1975). Jurisdiction may not be predicted solely upon the military status of both the wrongdoer and the victim. *United States v. Hedlund*, 2 M.J. 11, 14 (CMA 1976). Court-Martial jurisdiction has never been exercised when the sole basis was dependent status of the victim, *See, e.g. O'Callahan* at 274, 89 S.Ct. 1691, n 19.

Military courts-martial do not share the federal judicial power define in Article III of the United States Constitution. They are not courts of general jurisdiction, but possess only the power conferred upon them by Article I, Section 8, Cl.14 of the Constitution. Military tribunals are not subject to certain requirements applicable to Article III courts such as indictment by a grand jury, jury trial and a unanimous verdict in order to reach a finding of guilty as to the offenses charged. The exercise of court-martial jurisdiction must be limited to the minimum possible scope adequate to the end proposed, *Toth v. Quarles*, 350 U.S. 11, 23, 76 S.Ct. 1, 8 (1955). Military jurisdiction is authorized only where actually necessary to the maintenance of military discipline. *O'Callahan v. Parker*, 295 U.S. 258, 265, 389 S.Ct. 1683, 1687 (1969).

In the case before us the exercise of court-martial jurisdiction over the offenses allegedly committed against Amber Johnson and Jennifer Grantz would far exceed the minimum possible scope adequate to the end proposed. The criteria for determining the necessary scope of military jurisdiction were established in *O'Callahan* and set forth in detail in *Relford v. Commandant*, 401 U.S. 355, 365, 91 S.Ct. 649, 655 (1971). In the instant case, there is not a single *Relford* factor which would tend to indicate that jurisdiction lies in a court-martial. The *Relford* factors will be stated as they apply to the case.

1. The serviceman's proper absence from the base: Since there is no allegation that YN1 Solorio was even UA during his tour in CCGD17 he must have been on liberty or authorized leave during the time the alleged offenses took place.

2. The crime's commission away from base: 8916 Birch Lane is a privately owned residence in a community not pri-

marily made up of Coast Guard families and approximately 11 miles away from the nearest military facility.

3. Its commission at a place not under military control: There are no government quarters or leased housing in Juneau, Alaska except for the Admiral's home.

4. Its commission within U.S. Territorial limits: Alaska is a state.

5. Its commission in peacetime: Undisputed.

6. The absence of any connection between the defendant's military duties and the crime: All significant contacts between YN1 Solorio, Amber Johnson and Jennifer Grantz were wholly unrelated to YN1 Solorio's military duties or any other Coast Guard related activity.

7. The victim's not being engaged in the performance of any military duty: Amber Johnson and Jennifer Grantz, as dependents of service members, had no military or military-related duties.

8. The availability of civilian courts in which the case can be prosecuted: Alaska has civilian criminal courts available to prosecute these cases.

9. The absence of any flouting of military authority: There was no relationship with military authorities involving the offenses alleged to have occurred in a privately owned residence on off-duty time in Alaska.

10. The absence of any threat to a military post: The offenses allegedly occurred approximately 11 miles from any military installation.

11. The absence of any violation of military property: No military property nor the property of any servicemember was involved in the commission of any offenses charged.

12. The offenses are those traditionally prosecuted in civilian courts: The alleged offenses are not purely military and are traditionally handled by civilian courts and civilian support personnel. The fact that Alaska has presently deferred prosecution of the case to the Coast Guard is an insufficient basis upon which to predicate military jurisdiction. See *United States v. McCarthy*, 2 MJ 26, 29 (CMA 1976).

A review of the *Relford* factors makes it clear that the balance is weighted heavily in favor of concluding that this

court-martial lacks jurisdiction to try the offenses allegedly committed in Alaska by YN1 Solorio. The government, on the other hand, can allege only the remotest relationship between the alleged offenses and the military. The fact that a few Coast Guard members live in a community does not lead to the conclusion that the offense occurred on or near a military base. Many service members live in New York city, but that fact does not make New York a military community. The fact that a Coast Guard Social Worker interviewed an alleged victim at the government's request cannot be sufficient to confer subject matter jurisdiction on a court-martial. If that was enough, all cases tried by court-martial would be service connected based simply on the dedication of military personnel to the case. Finally, the mere fact that Coast Guard personnel have a high degree of mobility does not negate the availability of a civilian court in which the case could be prosecuted. In fact, Alaska would reconsider exercising jurisdiction should court-martial jurisdiction be lacking. All service members are mobile. That fact alone does not confer jurisdiction on a court-martial.

In *Relford v. Commandant*, the Supreme Court also noted nine other considerations in determining whether an offense had sufficient service connection to confer military jurisdiction. These other considerations will be discussed in connection with the facts in this case:

a. *Security of persons and property on base.* The offense as alleged did not occur on base, nor was any military property violated on base.

b. *Commanding Officer's responsibility for maintenance of order.* Order and discipline in the CCGD17 was never even remotely affected by the alleged offenses. In fact the offenses did not even come to light until one or two years after all the parties left the Seventeenth District.

c. *The impact and adverse affect caused by the commission of a crime on base, thus violating the bases very security, has upon morale, discipline, reputation, and integrity of the base itself.*

Since the offenses allegedly occurred off-base, neither the base's security nor its morale, discipline or integrity have



been impacted. Any impact these offenses may have will only be realized long after the incidents were alleged to have occurred while the victims are living far from the scene of the alleged crimes. Any such impact can only be categorized as remote and indirect and have no effect on the integrity of the base itself. The cases discussing a crime's effect on the morale or integrity of a military base have always emphasized that the impact must be clear and measurable. *United States v. Shorte*, 1 MJ 518, 520 (AFCMR 1984). See also, *United States v. McCarthy*, 2 MJ 26, 29 (CMA 1976) (the military interest was pervasive and the threat to the morale and discipline on base was actual and immediate).

In *United States v. Lockwood*, 15 MJ 1, (CMA 1983), the Court noted that the affect on morale "cannot be ignored in determining the service connection of off-post offenses." *Id.* at 10. In *Lockwood*, however, the affect on morale was direct and substantial since the offense involved the theft of a wallet from the accused's roommate on base, *Id.* at 7, and the Court found that the service member whose signature was forged was among the victims of the crime. *Id.* at 9. The impact upon morale was realized immediately, and not years after the commission of the crime.

d. *Congress' power under Article 1, Section 8, Clause 14 of the constitution to punish offenses.* This authority is limited by the Supreme Court's requirement of service connection as discussed in the *O'Callahan* and *Relford* cases. For all the reasons set forth herein there is insufficient service connection to justify the exercise of congress' powers.

e. *The possibility that civil courts may not entertain prosecution, and the need to vindicate disciplinary authority in the military community.* Because the need to vindicate military disciplinary authority is subject to the service connection limitation, the offense alleged here is too attenuated in its connection with the military community, however defined, to justify military jurisdiction. Further, Alaska will reconsider exercising jurisdiction if these offenses are found not to be service connected.

f. *Geographical and military relations may support jurisdiction.* The offenses are alleged to have occurred away from base when YN1 Solorio was removed from all military duties.

g. This alleged offense is not a crime against any person associated with or on a military base.

h. *Undue restriction of O'Callahan to military offenses.* While court-martial jurisdiction is not limited to strictly military offenses, such military jurisdiction cannot reach so far to a servicemen's off-duty life that it offends the limitations placed on military authority by the Supreme Court and the Court of Military Appeals. No concept of "pendent" military jurisdiction can be alleged here since the offenses in Alaska and New York do not arise from a common nucleus of operative fact. See *United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138 (1966).

i. *Distinctions between a post military and non-military areas.* These offense are alleged to have occurred far off base not during duty hours.

It is clear from the undisputed facts that the primary basis upon which the government claims subject matter jurisdiction is the fact that Amber Johnson and Jennifer Grantz are dependents of service members. Any other bases which the government may allege are merely bootstrapped from the dependent status of the victims.

In three cases directly on point with the instant case, the Court of Military Appeals stated unequivocally that sex offenses committed off base against dependents of service members are not service connected. In *United States v. McGonigal*, 41 CMR 95 (CMA 1969), the accused was charged with one specification each of sodomy and indecent liberties with a child under the age of 16. Since the incidents took place in the civilian residence of a service member in Colorado Springs, Colorado, the offenses were held to be not service connected. *Id.* at 95. (Colorado Springs is the home of the U.S. Air Force Academy, Fort Carson, and Peterson Air Force Base. Colorado Springs is undoubtedly a popular housing area for military personnel.). The court stated that "[a]bsent such [service] connection and where the offense is cognizable in the civil courts which are open and functioning, an accused may not be denied his right to the benefits of indictment and trial by jury." *Id.*

In *United States v. Henderson*, 40 CMR 313 (CMA 1969), the accused was charged with two specifications of carnal



knowledge with a female under the age of 16. Even though the accused met the dependent daughter of a serviceman on base, the offense was not service connected since the incidents occurred in the accused's off-base apartment. The court stated that only "the status of the victim as a military dependent and the fact of their meeting on base" differentiate *Henderson* from *O'Callahan*. *Id.* at 314. Since whatever service connection there was "was natal not legal," the court-martial was without jurisdiction to proceed. *Id.* The court further stated that the activities in question were not in any manner premised on the accused's status as a service member. Likewise, in the instant case, the alleged offenses are premised on YN1 Solorio's status as the father of Amber Johnson's and Jennifer Grantz' playmates and not on his military status. As was the case in *McGonigal* and *Henderson*, the offenses alleged to have been committed by YN1 Solorio against military dependents in a privately owned residence cannot be considered service connected.

The distinction between on base and off base sex offenses committed by service members was analyzed by the Court of Military Appeals in *United States v. Shockley*, 40 CMR 322 (CMA 1969). There, various sex offenses by a servicemember against his stepson took place first in their off base residence and continued after the family moved into government quarters. The court held that the offenses occurring off-base were not service connected, but the offenses which took place on base in government quarters were. *Id.* at 323.

The court's ruling in *Shockley* is clearly applicable to the instant case. The offenses which YN1 Solorio allegedly committed involving Melissa Carney and Jennifer Scott occurred on Governors Island and are unquestionably within court-martial jurisdiction. *See Relford* at 369, 91 S.Ct 657. Beyond question too is the fact that the offenses involving Amber Johnson and Jennifer Grantz are not even remotely service connected and as such are beyond court-martial jurisdiction.

That the above cited cases remain good law is indicated by the Court's ruling in *United States v. Rappaport*, 19 MJ 708 (AFCMR 1984) decided 30 November 1984. There the accused was charged with committing a sex offense against a

female Air Force officer. The court considered the twelve *Relford* factors and concluded that since the offense took place off base and had no connection with the accused's military duties, the offenses were not service connected and the court-martial lacked jurisdiction to try it. *Id.* at 711-12.

*Rappaport* is unlike those cases where court-martial jurisdiction obtained over off base offenses committed against service members. While the Court of Military Appeals has long recognized that military status of the victim, alone, was insufficient to establish subject matter jurisdiction, *Hedlund* at 14, *see also United States v. Wilson*, 2 MJ 24 (CMA 1976), it has also recognized that jurisdiction will attach over such offenses if other significant factors are present. For example, in *United States v. McCarthy*, 2 MJ 26, 29 (CMA 1976), service connection was established by the formation of criminal intent on post, the substantial connection between the accused's military duties and the crime, the fact that the accused knew the transferee was engaged in the performance of military duties at the time of the transfer, and the threat posed to the military community. *Id.*

In *United States v. Shorte*, 18 MJ 518 (AFCMR 1984) the off base offense against another service member was the culmination of a chain of events that began on base and which resulted in the victim being hospitalized for twelve days and thus unable to perform his military duties. The court found that in addition to the status of the victim, the offense had a "clear and measurable impact on the morale, reputation and integrity of the installation." *Id.* at 520. *See United States v. Hollis*, 16 MJ 954, 955 (AFCMR 1983) *pet. denied* 17 MJ 53 (CMA 1984) (morale was affected since the victim was a member of the same squadron as the accused), *United States v. Brauchler*, 15 MJ 755, 757 (AFCMR 1983) (essential preliminary acts were committed on base), *United States v. Rugiero*, 1 MJ 1084, 1097-98 (NCMR 1977) (but for the day to day military relationships between the accused, and the victim, the accused would not have had the opportunity to commit the offense), *United States v. White*, 1 MJ 1048, 1049-50 (NCMR 1976) (but for the significant military relationships, the accused would not have become acquainted with the victim, or known of her availability).

In the case before us, the sole link is the dependent status of the alleged victims. Criminal intent was not formulated on base, and no preliminary acts were initiated on base. Although YN1 Solorio and the victims' fathers were assigned to the same Coast Guard district, the relationships that developed were wholly unrelated to any Coast Guard functions. Those relationships developed primarily as a result of the relationship between the alleged victims and YN1 Solorio's sons. The fact that YN1 Solorio, CWO2 Johnson, and YN2 Grantz were assigned to the Seventeenth District had no bearing on the relationship between the families. That relationship would have developed in any event as a result of the Johnsons living next door to the Solorios and as a result of the children's involvement in school and after school activities.

Off base sex offenses against civilian dependents of service members have been found to be service connected when dependent status was one of many factors considered by the court. For example, in *United States v. Wierzba*, 11 MJ 742 (AFCMR 1981), the court found the following:

(a) that the accused used his status as an active duty Air Force member in a scheme to prey upon Civil Air Patrol Cadet victims; (b) that he used his on base housing and erotic materials contained therein, in this same scheme; (c) that he used his Air Force status, and resultant access to base, to victimize Air Force dependents whom he picked up in his car at their on base residences; and (d) that, by such conduct, he violated the personal security of Air Force families residing on an Air Force base, (e) and disgraced the public image of both the United States Air Force and its Auxiliary Civil Air Patrol.

*Id.* at 743-44.

The only similarities between *Wierzba* and the case before us is the involvement of military dependents in sex-related offenses. The Court of Military Appeals and the Courts of Military Review have been consistent in finding service connection only in cases where other significant facts aside from the status of the victims tip the balance in favor of the exercise of subject matter jurisdiction. See *Wilson*, at 25-26.

Notwithstanding the fact that *McGonigal*, *Henderson*, and *Shockley* remain good law, the Government may seek to rely on *U.S. v. Lockwood* in support of its argument that the Court of Military Appeals has extended court-martial jurisdiction to include the offenses involving Amber Johnson and Jennifer Grantz.

In *Lockwood*, the Court considered a number of *Relford* factors and considerations in arriving at its conclusion that subject matter jurisdiction was established over Lockwood's off base offenses. Lockwood's on base theft from his roommate of another airman's wallet "was an essential step in a course of conduct that led directly to the [off base offenses]." *Lockwood* at 7. Thus, the off base offenses were part of a common nucleus of operative fact that began on base and which would not have occurred in the manner they did without the initiation of the crime on base. The Court found that the "Armed Services have an interest in punishing a crime which is initiated within a military enclave, even if the offense is consummated off post," *Id.* at 8, based on "[t]he essential and obvious interest of the military in the security of persons and of property on the military enclave." *Id.* citing *Relford* 401 U.S. at 397, 91 S.Ct. at 656. The Court emphasized that the off base larceny and forgery had a direct and substantial effect on base in that one of the victims of the forgery was Sage, the servicemember whose signature was forged. *Id.* at 9.

In the instant case, the off base and on base offenses have no nexus in time, place or circumstance. Further, the offenses alleged to have been committed in Alaska against civilian dependents were not initiated on a military base and did not violate the security of persons or property within the enclave. The few instances where Jennifer Grantz or Amber Johnson saw YN1 Solorio while he was on duty were wholly unrelated to any offense alleged.

In *Lockwood*, use of military property, the I.D. card, was considered by the Court to be a flouting of military authority. *Id.* at 8-9. As was the case in *Wierzba*, 11 MJ at 743, Lockwood used his claimed status as a service member to perpetrate the off base larceny and forgery. The government can not claim that YN1 Solorio flouted military authority or



that he used his military status to perpetrate the alleged offenses in Alaska. At best, the government can only establish that YN1 Solorio's status as a neighbor and a friend involved in civilian activities laid the basis for the alleged offenses.

Finally, the Court in *Lockwood* found that "in light of the impact of [Lockwood's] offenses upon persons assigned at Sheppard Air Force base and the morale, reputation, and integrity of the base itself," the offenses were service connected. *Lockwood* at 10. This finding stresses the direct impact of the offenses upon service member victims. It also stresses the impact upon the base itself in that the security of persons and property on base were violated. It does not, however, lay down a broad rule that all offenses which in some way impact upon the morale, reputation, and integrity of the military in general will be service connected. Such a rule would make the service connection requirement a mere formality.

A review of *Relford*, *McCarthy*, *White*, *Hollis*, and *Shorte* reveals that the impact upon morale, when coupled with other significant factors, must directly and substantially affect the base at which the accused is assigned at the time of the offense. In the case before us, the offenses alleged to have been committed in Alaska can only indirectly affect military discipline and effectiveness long after the offenses were alleged to have been committed. Although Amber and Jennifer's need for counselling is a concern of their parents, the same impact on morale, military discipline and effectiveness would be realized if the perpetrator was a civilian neighbor or friend. The military status of the accused, wholly unrelated to any impact, the offenses may have upon the military, may not serve as a basis for court-martial jurisdiction.

### Conclusion

In *Lockwood*, the Court examined and found a number of factors and considerations which clearly established court-martial jurisdiction. An examinations of *O'Callahan*, *Relford*, *Rappaport*, *McGonigal*, *Henderson*, *Shockley*, *Wierzba*, and *Lockwood* must lead to the inevitable conclusion that the facts which the government will be able to prove at trial do not

establish any one of the *Relford* criteria or considerations. Rather, the facts fit squarely within the long established principle that where:

crimes are committed upon or against *civilians*, and not at or near a military camp or post, or in breach or violation of a military duty or order, they are not in general to be regarded as within the description of the Article, but are to be treated as civil rather than military offenses.

*O'Callahan* at 274, 89 S.Ct. at 1691, n. 19, *citing* W. Winthrop, *Military Law and Precedents*, 1124-25 (2d ed. 1896, 1920 reprint) (emphasis in original).

For the abovementioned reasons, the offenses involving Amber Johnson and Jennifer Grantz are not service connected and must be dismissed.

/s/ ANDREW M. HOCHBERG  
Andrew M. Hochberg  
LT, USCGR  
Detailed Defense Counsel

(Certificate of Service omitted in printing).



BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD DIS-  
TRICT, GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Brief in Support of Subject Matter Jurisdiction

R.C.M. 201 and 203 set out the jurisdictional requirements for courts-martial. The accused, through counsel, argues that this court does not have subject matter jurisdiction over the offenses that took place in Alaska. The government, in the jurisdictional statement attached to the charge sheets and in a bill of particulars provided to the accused prior to the Article 32 Investigation, has placed the defense on notice of the jurisdictional basis for the Alaska offenses. Briefly, the government contends that child sexual abuse committed by a Coast Guard member by victimizing Coast Guard dependents, has such a substantial and dramatic impact on the effectiveness of the military parent of the victim, on the morale of the unit and the service, on reputation of the service in the community, on the military working relationships among the military members involved and on the trust for other Coast Guard members that is necessary when the military member is transferred PCS or TAD or deploys, that there is a unique military interest sufficient to confer court-martial subject matter jurisdiction over the offense.

Although at one time, any offense committed by a member of the armed forces was triable at court-martial by virtue of the accused's status as a service member, *Kinsella v. United States ex rel Singleton*, 361 U.S. 234 (1960), that view was rejected by the Supreme Court in *O'Callahan v. Parker*, 395 U.S. 258 (1969). There it was held that the offense must be "service connected" before the court-martial could have jurisdiction over the offense. Since 1969, the issue of military courts-martial jurisdiction has been dealt with repeatedly by the military trial and appellate courts. In essence, the rule on service connection has evolved to the point where today, each case in which an issue of service connection arises is dealt with on a case-by-case basis, whether the offense occurs on base or off base. Careful attention is paid to the precise set of facts surrounding the offense that has occurred. See *Relford*

*v. Commandant*, 401 U.S. 355 (1971); *Schlesinger v. Councilman*, 420 US 738 (1975). The breadth of military jurisdiction over off base offenses is not precisely defined by any *per se* rule. See *United States v. Rock*, 49 CMR 235, 237 (AFCMR 1974).

The offense in *United States v. Solorio* deals with crimes that occurred off base at the defendant's home in Juneau, Alaska involving Coast Guard dependents. Normally the occurrence of a crime on base suffices in and of itself to establish service connection. *Relford, supra*. However, crimes that occur off base may also be service connected. *United States v. Trottier*, 9 MJ 337 (CMA 1930); *United States v. Rock*, 49 CMR 235 (AFCMR 1974). This is particularly true where, as here, the off base crime has a significant impact on the moral, security and readiness of military members working on base, on the reputation of the service, and poses a threat to the base and to military members and their dependents. Just as a "State and its citizens may be adversely affected by conduct that occurs inside its boundaries; sometimes the State will seek to punish that conduct. Similarly, a country and its citizens may be injured by activities that take place beyond its frontiers, so it may seek to prohibit that conduct. In like fashion, the conduct of servicemen which takes place outside a military enclave is service connected and subjected to trial by court-martial if it has a significant effect within that enclave." *United States v. Lockwood*, 15 MJ 1, 15-6 (CMA 1933).

*United States v. Lockwood, supra*, stands for the accepted jurisdictional principle that courts-martial may properly try any offense which is referred to it where there is a significant impact upon persons assigned at the base and which adversely affects the moral, reputation, and integrity of military personnel and the military base itself. Chief Judge Everett, writing the majority opinion, stated that the reason behind the holding is that:

"Few military enclaves are self-sufficient and usually the servicemen assigned to a post and their dependents must rely on persons in the surrounding communities for various types of support—such as housing, credit, and

recreation. An offense committed by a servicemember near a military installation tends to injure relationships between the military community and the civilian community and thereby makes it more difficult for servicemembers to receive needed local support."

Additionally, Chief Judge Everett recognized that a military organization has an interest in maintaining a good reputation, and he specifically noted: "it should be apparent that, for a nation which now relies on an All-Volunteer Force obtained by recruitment and which needs to retain in uniform 'career soldiers' skilled in the technology of modern warfare, maintaining the 'reputation' and 'morale' of the Armed Services is essential." *Lockwood* thus represents an evolutionary change in how the Court of Military Appeals views the service connection issue. Mechanistic jurisdictional rules reciting the military status of victims or the situs of the offense, have given way to a flexible jurisdictional analysis that focuses on the impact that off base offenses have on the military's morale, readiness and reputation.

The state of military law concerning the service connection of off base sexual offenses has undergone evolutionary changes not dissimilar to the evolutionary jurisdictional holdings in off base drug offenses. Before the *O'Callaghan* case, all off base drug offenses were service-connected. See, e.g., *United States v. Beeker*, 18 USCMA 563, 40 CMR 275 (1959) (use of drugs on or off base has "singular military significance"). After *O'Callaghan* and *Relford*, the service-connection analysis changed radically for off base drug offenses. Off base drug offenses, as recently as five years ago, were mechanically analyzed in terms of *O'Callaghan-Relford* categories and, in most cases, no military jurisdiction was found.

From 1969 to 1980 off base drug offenses in increasing numbers were beyond the jurisdiction of military courts. Finally, *United States v. Trotters*, 9 MJ 337 (CMA 1980) stopped the madness of court-martial impotence in the face of the drug threat to military readiness. The *Trotter* court questioned whether "this court should have been so slavish in

applying these *Relford* criteria . . .", and cited *Scheslinger v. Councilman*, 420 U.S. 738, 760, 95 S.Ct. 1350, 1314, 43 L.Ed.2d 591 (1975) to support a more flexible analysis:

"[the issue of service connection] turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of the civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts. These are matters of judgment that often will turn on the precise set of facts in which the offense has occurred. . . . More importantly, there are matters as to which the expertise of military courts is singularly relevant, and their judgement indispensable to inform any eventual review in Art. III courts."

But the changes in military and civilian societies, particularly the concern about drug use in the military, forced a new analysis of service-connection in off base drug offenses. The *Trotter* court recognized the simple fact that "drug abuse in the military is a most serious problem. . . . Our military forces include large numbers of young persons who are major targets for drug vendors and the nature of whose lives may create a special vulnerability to drug use. And it is very difficult to predict where drugs will travel—and into whose hands—where they are possessed in substantial quantity or are being distributed by service personnel in the vicinity of a military installation." Post-*Trotter* analysis, in contrast to post-*Relford* analysis, normally finds military jurisdiction in off base drug offenses based on the following rationales: 1) the *Relford ad hoc* factors demand flexible jurisdictional analysis based on changed conditions in military and civilian societies (9 MJ at 345); 2) the fine line of military readiness between peace and hostilities requires discipline and readiness at all times, (9 MJ at 347); 3) the unlikelihood of civilian prosecution of all drug offenses by military members off base (9 MJ at 352). The *Trotter* Court also cited additional *Relford* considerations as justifying military jurisdiction over off base drug offenses: 1) the obvious command interest in the security of persons moving in and out of the



military enclave: 2) the interest of the military commander in maintaining order and discipline; 3) the Congressional power to make "Rules and Regulations for the land and Naval forces" permits the regulation of areas beyond "purely military offenses" and 4) the civilian courts' inability to vindicate distinctly military interests in drug offenses.

Although post-*Trottier* off base drug cases almost invariably are held to be within military court-martial jurisdiction, the appellate cases seem to find service connection from the threat to the military installation of an off base drug user, possessor, or seller. The primary threat that justifies service connection is not that the accused may in fact be "under the influence" of drugs, when he returns to the base but that the threat that service members without respect for laws and regulations may at *any time* be under the influence, and may also infect other service members with the bad influence of their lawless example, thus damaging the cohesiveness, military responsiveness, morale and reputation of the service. 15 MJ At 10.

In the area of off base sex offenses by service persons, there has been a similar evolution toward a finding of service connection. The cases cited by the counsel for the accused represent the traditional mechanistic post-*O'Callaghan-Relford* analysis. In *U.S. v. McConigal*, 41 CMR 95 (CMA 1969) the court held that off base offenses of sodomy and indecent liberties with a daughter of another serviceman under the age of 16 were held to be not service connected. In *U.S. v. Shockley*, 18 USCMA 610, 40 CMR 322 (1969) held that off base child abuse offenses against the accused's stepdaughter were not service connected while on base offenses were service connected where the victim was the accused's stepson. The court used an on base/off base litmus test and held that the military was responsible for security on base and that that was sufficient to vest jurisdiction. Finally in *U.S. v. Rapaport*, 19 MJ 708 (AFCMR 1984) the court held to be non-service connected an off base sodomitical relationship between accused and a former servicewoman. The victim was apparently not in the service at the time of the offense and had no relationship to the service. Bot *McGonigal* and

*Shockley*, decided in 1969 immediately after *O'Callaghan*, have been overtaken by the modern and flexible *Lockwood* analysis for service connection.

*Lockwood* emphasizes the effects of the off base offense on the service, effects such as: 1) impacts on on base security and combat readiness of off base offenses (15 MJ at 5); 2) judicial economy/judicial logic of disposing of all related offenses in one forum (15 MJ at 7-8); 3) the special military interest in prosecuting crimes by service members (15 MJ at 8); 4) the impact of off base crimes on the reputations and lives of other innocent service persons (15 MJ at 9); 5) the proximity of the off base offense to the base or other military persons (15 MJ at 9); 6) the injury to military-civilian community relationships on which military services depend for community support services (15 MJ at 9); 7) the injury to the morale, discipline, and integrity of the base and the military service (15 MJ at 9); 8) the injury to the service's reputation in the all-volunteer era (9 MJ at 9-10); 9) the injury to the moral and reputation of service personnel who must operate in high stress, high responsibility and high-tech missions (9 MJ at 10); 10) the need for periodic reexamination of service-connection in light of changes in the military and in society (15 MJ at 10). The court analogized these on base impacts of off base criminal acts to the jurisdiction of a state to punish conduct occurring outside the state that adversely affects the state or its citizens. In a footnote to *Lockwood*, the court gave an example of such in-state impacts from out-of-state activities. The Uniform Reciprocal Enforcement of Support Act authorizes a state to punish an out-of-state parent for failure to support an in-state dependent. 15 MJ at 5n.4.

The *Lockwood* analysis of the impacts on the service's reputation, morale and effectiveness arising out of off base crimes have been recognized in many modern military cases that find service connection in off base sex offense cases. In *United States v. Hollis*, 16 MJ 954 (AFMCR 1933), a male airman was accused of an off base rape of a female airman. The Air Force personnel involved were members of the same unit who knew each other socially; they drove from the base, 25 miles to a religious shrine where the rape took place. Jurisdic-



tion rested not upon the status of the victim alone, but on 1) the thrust the victim had in fellow servicemen; 2) the military commander's perception that failure to prosecute would damage internal morale and effectiveness; and 3) the fact that the military had a greater interest in prosecution of the case than did the civilian community. 16 MJ at 955-56. The local district attorney also noted that the entire investigation was performed by military personnel, that the local police and courts had not been involved in the case, that judicial economy would favor resolution in one forum and that the emotional strain on the witness/victim/defendant would be minimized by one trial forum. 16 MJ at 957.

In *U.S. v. Brachler*, 15 MJ 755 (AFCMR 1983) the accused was charged with off base indecent acts and indecent assaults. Although the victims were subordinate service-women, the court balanced all *Relford* factors, refusing to employ the victim's military status as a simple litmus test. The court noted that 1) certain preliminary acts to the assaults took place on base; 2) both parties were in uniform and were in a superior-subordinate military relationship; 3) there was a significant threat to the maintenance of good order and discipline; and 4) the distinctly military interest could only be vindicated in a military trial. 15 MJ at 755.

In *United States v. Mauck*, 17 MJ 1033 (ACMR 1984) the court rejected the on post off post distinction as a litmus test for service connection: "The border of a military post is not a demarcation line where court-martial jurisdiction ends."

In *U.S. v. Shorte*, 18 MJ 518 (AFCMR 1984) the court considered an off base assault by one serviceman against another serviceman. The court did not find service connection based on the status of the victim, but used a *Lockwood* analysis of impacts on base, stating that "we base today's holding that military jurisdiction exists on the fact that the military has a distinct and greater interest in the prosecution than does the civilian community." The court noted the many factors to be considered: 1) status of victim; 2) chain of events starting on base; and 3) loss of useful work by the victim injured by accused.

All of these cases demonstrate there is a new flexible jurisdictional concept of service connection in off base sex offenses arising out of a changed military society. The *Lockwood* analysis requires a 1) case-by-case balancing of all *Relford* criteria and considerations; 2) an acknowledgement of changed conditions in military and civilian life that requires a slightly different balance of jurisdiction from time-to-time; and 3) a closer look at the impacts that off base offenses have on the morale, reputation and effectiveness of service persons, persons on base and the service in general.

In relation to the charges preferred against YN1 Solorio, a case-by-case balancing of *Relford* factors and considerations is necessary. The changed military and civilian factors that must be considered are legion, but include the following:

1. The importance of a stable and supportive family in fostering a secure, attentive, happy, and productive service person. See Family Advocacy Program, COMDTINST 1750.3 dtd 3 APR 1983 (especially discussion, and policy and procedure sections); Your Coast Guard Career, COMDTINST P1750.4 (especially chapters on family life, civilian support services, support networks, participation in local community.

2. The incidence of child abuse in military community and the factors in military life that can exacerbate abusive situations. See Child Protection in Military Communities, U.S. Dept. of Health and Human Services (National Center on Child Abuse and Neglect) (May 1980).

3. The Coast Guard's reliance on off base housing and off base community services to provide attractive and wholesome duty stations for Coast Guard members and their families. See Your Coast Guard Career, COMDTINST P1750.4.

4. The PCS mobility of Coast Guard personnel with their dependents which decreases the civilian law enforcement and civilian judicial systems' motivation and ability to investigate and prosecute off base offenses and which increases the uniquely military interest in prosecuting off base offenses of transferred service persons involving transferred Coast Guard dependent victims.

5. The damage to the reputation, and morale of the servicemember parent, the Coast Guard family involved, the base and the service in general.

Because of many of these factors, the law of service connection on off base offenses with military dependents as victims has undergone an evolution toward military jurisdiction that is similar to the evolution of marijuana and sexual abuse cases. In *U.S. v. Snyder*, 20 USCMA 102, 42 CMR 294 (1970) the court held there was no service connection to charges of off base involuntary manslaughter where the victim was a dependent infant. In accord *U.S. v. Boys*, 13 USCMA 547, 40 CMR 259 (1959); *U.S. v. Sharkley*, 18 USCMA 610, 40 CMR 322 (1969); *U.S. v. Henderson*, 18 USCMA 501, 40 CMR 313, (1969); *U.S. v. McGonigal*, 19 USCMA 94, 41 CMR 94 (1959). All cited cases were the immediate reaction in 1969 to *O'Callaghan v. Parker*, 395 US 258, 89 S.Ct. 1683 (1969).

The modern trend in cases involving dependents is typified by *U.S. v. Wierza*, 11 MJ 742 (AFCMR 1981), a pre-*Lockwood* cases that uses a *Lockwood* analysis of service connection. The case involved an Air Force Sergeant accused of taking lewd and lascivious liberties with five dependent boys; four of the alleged acts occurred off base. Among the bases for military jurisdiction over the off base offenses was the following: 1) he violated the personal security of families residing on an Air Force base; 2) he disgraced the public image of the Air Force and the CAP; and 3) the "military's interest in prosecuting the off base portion of the charged offenses far exceeds that of the civilian community wherein the offenses were committed. The analysis of subject matter jurisdiction in *Wierza* is taken from *Schleisenger* and *Trottier*. 11 MJ at 744. Because *Wierza* involved both on base and off base offenses, the court indicated that all similar offenses should be tried together. The *Wierza* case thus illustrates another emerging concept in military jurisdiction—"pendent jurisdiction." Although pendent jurisdiction is a civil concept, in a military case it stands for the proposition that there is a

"distinct military interest" in trying all "related" cases against a service member in one military forum. *Lockwood* alludes to "pendent jurisdiction" which does

"not in itself provide an adequate basis for depriving an accused servicemember of constitutional protection to which he would otherwise be entitled in a criminal trial. However, we recognized that some of the same conclusions which support "pendent jurisdiction" are relevant in determining if service connection exists. See *UMW v. Gibbs*, 383 US 715, 725 86 S.Ct. 1130, 1139; 16 L.Ed.2d 218 (1966).

Military courts have looked to "pendent jurisdiction" to support service connection for many years. In 1974 in *U.S. v. Rock* the Army Court of Review said:

"One implication arising from the combination of the three expressed opinions with regard to service connection in *Gosa* and the "forum appropriateness" holding of the plurality, is that if a serviceman is properly before a court-martial on charge alleging a clearly service connected offense, he might also be tried for a non-service connected offense." 40 CMR at 238 citing *Gosa v. Mayden*, 413 US 665 (1973).

See also *U.S. v. Lockwood*, 11 MJ 313 (AFCMR 1981) (Miller J. concerning and discussing "pendant jurisdiction").

In *U.S. v. Lampini*, 11 MJ 632 (AFCMR 1981) (a case not involving a sex offense) the court faced a situation where the prosecution presented alternative theories of criminal liability: one theory which had a definite service connection, the other alternative theory had little or no service connection. The accused was convicted of the alternative theory based on the simple theory that "proper administration of justice required that a single court decide the issues at a single trial." This interest in the administration of justice was the "distinctly military interest that could only be vindicated adequately at a court-martial . . . *Schlesinger v. Councilman*, 420 U.S. 733, 760, 95 S.Ct. 1300, 1314, 43 L.Ed.2d 591 (1975)" The conviction of the accused on the non-service-connected



alternative theory was upheld. The court also noted that the civilian court requested the military court to assume jurisdiction. 11 MJ at 634n.2.

The factors that facilitate the use of pendent jurisdiction in the instant case are:

(1) The military's interest in one judgment, one sentence, uncomplicated by the prosecution of a member by a state jurisdiction, thus complicating sentence service, rehabilitative efforts, and witness and defendant time away from useful military service.

(2) The Coast Guard has ordered victims and accused away from the state's jurisdiction for military purposes unrelated to the offenses, thus decreasing the interest and ability Alaska might have in prosecuting and, increasing the cost of the state's investigation and prosecution.

(3) The Coast Guard having transferred the victims and accused far from Alaska has an increased interest in disposing of charges arising in Alaska because it does not want to be seen as a haven for criminal behavior in the civilian community. A military member, knowing that he will be transferred away, will be less respecting of local law if he/she knows that his/her transfer will diminish the chances of state prosecution.

In summary, case law and the *Relford* factors clearly establish jurisdiction over the Alaskan offenses based on the following:

1. The threat to the military post. *U.S. v. Relford*, 401 U.S. 355 (1971) (factor 10, R.C.M. 203) Sexual offenses against Coast Guard dependents lowers morale and trust, depletes scarce medical and family support resources of the Coast Guard and poses a threat to other Coast Guard dependents at other commands upon the perpetrator's PCS or TAD moves.

2. Flouting of military authority. *U.S. v. Relford, supra*, (factor 9). In Alaska, the accused's victims were known to him to be Coast Guard dependents, daughters of his fellow yeomen in the office. This shows a disrespect for his superior and subordinate co-workers by committing attacks on co-workers' families that irretrievably damage working relationships and trust among service persons.

3. Connection between the accused's duties and the crime. *U.S. v. Relford, supra*, (factor 6, R.C.M. 203). The accused met with both victims at his office, in uniform. He retained extra dependent ID pictures of one victim in his wallet. The accused's status as a Coast Guard Petty Officer was a factor in the trust that was placed in him to coach in a children's bowling league and soccer league. One of the victim's fathers recruited the accused, a fellow yeoman, to coach in a children's bowling league. The accused was asked to coach in the children's soccer league because he played on the Coast Guard soccer team. It was through these coaching positions that the accused gained the trust of the victims that facilitated the sexual abuse. *See also Relford* consideration 5 (R.C.M. 203) (use of military status.)

4. The civilian courts are not available to prosecute this case. *U.S. v. Relford, supra* (factor 8, R.C.M. 203) The revelation of the offenses that took place on Governors Island led to an investigation of the accused's activities in Juneau, Alaska. Interviews with Jennifer Grantz and Amber Johnson led to the Alaskan charges. Both the victims of the Alaskan charges and the accused were transferred to the East Coast before the offenses were discovered. Alaskan authorities have not charged the accused, nor have they interviewed any of the victims. A representative from the State Attorney's Office in Juneau has indicated that the expense of investigating and prosecuting and the paramount Coast Guard interest in prosecuting child molestation charges arising out of two separate duty stations has led the state to defer to military jurisdiction. *See also* Additional Consideration 5, R.C.M. 203 (non-federal courts will have less than complete interest, concern, and capacity to vindicate military concerns).

5. Security of persons *U.S. v. Relford, supra* (Additional Consideration 1, R.C.M. 203) The mobility of military personnel on TAD or PCS orders not only makes it more difficult for states to prosecute, but the perpetrator of lawless conduct carries around with him the threat to the security of military personnel and their families. The off-base offenses in Alaska became a threat of on base offenses in Governors Island. In addition to the direct threat to the child-victims, there are



other victims to this type of offense—the military member and his spouse are attacked. Both the child victims and adult victims require counseling and treatment. The whole family, the military member included, undergoes something similar to a “rape trauma syndrome” that requires professional attention. One of the military members said of these offenses, “It would have been easier on both me and my family if *he* had assaulted *me*.” The effect of these offenses on the Coast Guard family and the military member is the same, whether the offense is on or off base. The Coast Guard has made a special effort to assist and nurture families in the Coast Guard on the basis that retention and productivity of the military member are increased. Criminal acts of sexual abuse victimizing Coast Guard dependents destroys the effectiveness of the Coast Guard’s family support programs.

6. Violation of base security. *U.S. v. Relford, supra* (Additional Consideration 3, R.C.M. 203) Where a Coast Guard member commits such offenses against the children of his fellow servicemen, the effects on morale, discipline, reputation, and integrity are keenly felt *on* the base itself. Every serviceperson’s reputation in the community is diminished.

“An offense which directly threatens the security of an installation may be service-connected even though it occurs off base. When an offense is committed near a military installation, the proximity may support a finding of service-connection as when it injures relationships between military and civilian communities and makes it more difficult to receive local support.” R.C.M. 203

7. Presence of factors such as geographical and military relationships *U.S. v. Relford, supra*. (Additional Consideration 6, R.C.M. 203) The fact that the civilian housing area near Juneau was a popular area for Coast Guard families may be properly considered. The Coast Guard subsidizes housing costs for military personnel in the Juneau area. The housing area was only 11 miles from the District Office in Juneau. The military relationships between the accused and both CWO Johnson and YN2 Grantz, all of whom were Yeomen, have been irretrievably damaged by the offenses.

8. Historically, a crime against one “associated” with the post created service-connection. *U.S. v. Relford, supra*, 401 U.S. at 369; R.C.M. 203; The dependents of military members are certainly “associated with the post.” Members received cost of living and housing allowances in Juneau based on the number of dependents; allowances for travel on PCS orders are given for dependents. Offenses against “camp followers” have always been within the jurisdiction of courts-martial. Winthrop, *Military Law and Precedents* 724, 725 (2nd Ed. 1920 reprint). The *Relford* factors themselves grew out of a case where the offenses were against the sister of a service member who was properly on base, and against the spouse of another service member. 41 U.S. at 367-69.

9. The inability to draw a line between on and off base offenses, duty and off-duty time. *U.S. v. Relford, supra* (Additional Consideration 9, R.C.M. 203). The accused built up a relationship with Jennifer Grantz and Amber Johnson over a period of time. How much of this relationship was facilitated by YN1 Solorio’s position in the Coast Guard is unknown. That some part of it was based on his position in the Coast Guard is certain. YN1 Solorio knew the two girls were Coast Guard dependents; they knew he was in the Coast Guard; they met him on occasion, at the office. YN1 Solorio coached the girls in the Youth Bowling league, a position he gained in part because YN2 Grantz knew him in the Coast Guard at the District Office. In addition, the criminal acts of a serviceman have an impact on the reputation of the service whether on or off base, on- or off-duty. The local Juneau papers report arrests and identify military members by branch of service. The effects of the offenses “on the reputation and morale of the Armed Services is an appropriate consideration in determining service-connection” R.C.M. 203 (Discussion)

10. Effects on reputation of the service, *U.S. v. Lockwood, supra*. Chief Judge Everett noted that some offenses may have an impact on recruitment and retention in a “nation which relies on an all-Volunteer Force.” When a Coast Guard member commits sex offenses against Coast Guard dependents, recruitment and retention are diminished. In a service where TAD and deployments often leave only one

spouse to attend to children, other service families are often relied upon and trusted to assist. The military members rely on community services, and symbiotically, the community services rely on military volunteers. Offenses such as child molestation, committed by a service member who coached community youth teams while victimizing Coast Guard dependents, tends to damage the reputation of the service and the morale of the service. The community may look with suspicion on Coast Guard volunteers for youth services. Coast Guard volunteers in youth activities may fear physical contact with children that is honest, well-motivated and necessary, because of the fears engendered by sexual offenses against children. In the context of off base drug offenses, *Trottier* noted "... it is difficult to predict where drugs will travel, -and into whose hands-[they will, fall]". Similarly in a small close knit service, the impacts of child sex abuse may be felt far away from the off base scene of the offense in Juneau. It may have impact on Governors Island after a transfer, or in a recruiter's office, or in a social worker's office in Washington where a tearful story of sex abuse is told or in a school in Virginia where a teacher is told of abusive events in Juneau. The effects of the crimes involving child molestation travel throughout the tight knit fabric of the Coast Guard family and the surrounding civilian communities.

11. The child victims and family-victims have been treated by military facilities. See *U.S. v. Shorts, supra*. These offenses breed psychological harm in many victims. The entire family usually is counseled for six to twelve months or longer. Long term treatment of the victims places demands on scarce military resources. The military member under treatment for psychological injury loses effectiveness and loses time from his duties.

12. *Pendant jurisdiction. U.S. v. Lockwood, supra; U.S. v. Wierza, supra, U.S. v. Lampini, supra, Gosa v. Mayden, supra*. The on base offenses on Governors Island and the off base offenses in Juneau are part of a common plan or scheme, and originate from a common intent. MRE 404. The impacts on reputation, morale and military effectiveness are identical

for on base and off base offenses. The military members who are witnesses, and the child victims who are witnesses should be spared the time and "trial trauma" of multiple trials. The accused should be spared the multiple exposure to punishment. The service has an interest in avoiding these costs because they represent lost resources. Multiple punishments by different sovereigns may be counter-productive, as when the military court seeks to rehabilitate an offender for future useful work, and the civilian court imprisons, thus blocking rehabilitative efforts of the service. The concept of "pendent" jurisdiction, combined with the obvious on base effects of the off base offenses, establishes a firm service connection.

13. There is a distinct military interest in prosecution of this offense that cannot be vindicated in civilian courts. R.C.M. 203. This distinct interest arises out of a combination of all of the factors mentioned above, although two deserve special mention. First, the Coast Guard has, through its PCS transfers, made it difficult for the State of Alaska to investigate and prosecute. The Coast Guard has removed much of the incentive to expend scarce state prosecutorial resources on a case where neither the victims nor the offender reside in the state. From this diminution of civilian interest arises a distinct and greater military interest - that the periodic PCS transfer not be an artificial barrier to justice. Second, the Coast Guard has placed a great emphasis on Family Advocacy and Family Programs in order to make military life more attractive and to increase the effectiveness of the military member. Offenses by a serviceman against Coast Guard children are in a real sense, offenses against the Coast Guard Family. The Coast Guard realizes that family support is necessary for good morale. When a criminal act by another serviceman tears the emotional fabric of the Coast Guard member's family apart, the service has also been made a victim.

"[The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of



civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." *Schlesinger v. Councilman*, 428 U.S. 733, 760 (1975).

This Court-Martial has subject matter jurisdiction over all offenses charged.

/s/ FRANK E. COUER  
LCDR, USCG  
Trial Counsel

(Certificate of Service omitted in printing).

**BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK**

(Title omitted in printing)

**Stipulation of Facts for Jurisdictional Motion**

It is hereby stipulated by and between trial counsel and defense counsel with the express consent of the accused without waiving the defense's right to object on evidentiary grounds, that the following facts are true:

1. Yeoman First Class Richard Solorio, while assigned to the staff, Commander, Seventeenth Coast Guard District, Juneau, Alaska lived at 8916 Birch Lane, Juneau, Alaska. The residence at 8916 Birch Lane is privately owned by YN1 and Mrs. Solorio and was purchased on 1 April 1981. They has rented the house and resided in it since 24 November 1980. YN1 Solorio and his family moved out of the house on or about 1 June 1984 when he departed PCS to New York. During the entire period in question, from 25 March 1983 to June 1983, Chief Warrant Officer Larry V. Johnson and his family lived next door to the Solorios in a private residence on Birch Lane. The neighborhood consisted entirely of private, single family residences. Aside from YN1 Solorio and CWO2 Johnson, YN1 Solorio knew of only one other Coast Guard member in the immediate neighborhood. The Senior Enlisted Adviser, Master Chief Boatswain's Mate Ron Haigh, lived on the same block as YN1 Solorio and CWO Johnson. He usually wore the uniform to and from work and he had a Coast Guard sticker on his car. He usually kept the car in the garage. During the period in question 25 March 1982 through 5 June 1984, Yeoman Second Class Frank Grantz lived in a privately owned trailer in a trailer park in Juneau, Alaska in a different neighborhood, approximately one half mile away. It took Jennifer Grantz 5-10 minutes to get from her trailer to YN1 Solorio's house by bicycle.

2. During the period of time the Solorio's lived in Juneau, YN1 Solorio was an E-6. His wife Toni Solorio was employed until October 1982 by the United States Forest Service. After leaving the Forest Service, Mrs. Solorio was self-employed as a licensed day care operator using the family



residence for this purpose. Her income producing ability was a significant factor considered by the lender, the First National Bank of Anchorage, in deciding to take a mortgage from the Solorio's. Mrs. Solorio's income was at all times sufficient to cover most or all of the monthly mortgage payments. A housing allowance of approximately \$700.00 per month was received by YN1 Solorio from the Coast Guard. There is no Coast Guard housing in Juneau except the Admiral's house. All personnel at the district office "live on the economy," renting or purchasing housing. All personnel received a housing allowance.

3. CWO Larry Johnson was a YN1 when he started his tour at the Seventeenth Coast Guard District (eee) in August 1978. YN1 Solorio moved next door to the Johnsons in November 1980. YN1 Solorio worked in (osr) and went to military personnel (pp) after CWO Johnson left that office. CWO Johnson as a YN1 worked in (eee), (pp), then (ps). He was promoted to YNC in (ps) while YN1 Solorio was in military personnel (pp). CWO Johnson moved from Juneau in June 1983. YN2 Grantz worked in (eee) during his entire tour from 11 July 1980 to 29 June 1984 with the exception of only one week when he worked in (pp).

4. YN1 Solorio became acquainted with Amber Johnson after Amber, and Brian and Manual Solorio had become friends. Amber would spend time at the Solorio's home and Brian and Manual would also play at the Johnson residence. CWO2 Johnson and YN1 Solorio became friends as a result of their being next door neighbors, and as a result of their children's friendship. Also, the Solorio's would socialize with the Johnson's in their homes. Amber played on the City Youth Soccer League, coached by YN1 Solorio. Because the Johnsons lived next door, Amber would get a ride to and from soccer with YN1 Solorio if Jo Ann Johnson wasn't coming to the game. Mrs. Johnson also ran a day care center in her home. YN1 Solorio and CWO Johnson drove to work together on various occasions. One of the reasons was so that one of their cars would be available to their spouses in case of an emergency. YN1 Solorio usually traveled to work by bus.

5. YN2 Frank Grantz and YN1 Solorio became friends as a result of their association with a Juneau Men's city basketball league. They knew each other from the district office. They also were associated with each other as President (Grantz) and Treasurer (Solorio) of a youth bowling league in Juneau in which their children participated. YN2 Grantz asked YN1 Solorio to assist in the youth bowling league because he knew YN1 Solorio's children were involved in the league, and knew Solorio to be interested in bowling. YN1 Solorio became acquainted with Jennifer Grantz as a result of his friendship with YN2 Grantz and as a result of Jennifer's friendship with YN1 Solorio's two sons. Jennifer also competed on a youth bowling league team, and played on the Juneau Parks and Recreation league soccer team coached by YN1 Solorio. YN1 Solorio asked YN2 Grantz to coach the soccer team on occasions when YN1 Solorio was absent. Neither league was sponsored by the Coast Guard. The youth soccer league was sponsored by the city and the youth bowling league by a private association with both civilians and Coast Guard dependents participating. Adult leaders were both Coast Guard and civilian parents of the participants.

7. Jennifer Ann Grantz was born on 23 October 1971 and is the daughter of YN2 Frank Grantz, USCG and his wife Cathy Lynn Grantz. She is not, and has never been, married to the accused or to anyone else. YN2 Frank Grantz is now assigned to Commander Coast Guard Group Baltimore, MD.

8. Amber Lee Johnson was born on 12 March 1972 and is the daughter of CWO Larry Johnson and his wife Joann Johnson. Amber was in 3rd grade in the fall of 1980 when the Solorios moved in. She is not, and has never been, married to the accused or to anyone else. CWO Larry Johnson is now assigned to Commandant (G-OIS).

9. The Grantz family is undergoing counselling in the Anne Arundel Country Crisis Center in Maryland (a state-funded activity) to assist them in dealing with this situation. YN2 Grantz has expended personal funds for physical examination and medical treatment of Jennifer.

10. Amber Johnson has received counseling from a social worker employed by Northern Virginia Social Services (a state-funded activity). The expense for this counseling has

been borne by CWO Johnson. CWO Johnson has contacted Brenda Watson, a social worker employed by USCG Headquarters, to assist him on two occasions in coping with this situation. CWO and Mrs. Johnson are also undergoing counseling with private counselors.

11. The Solorios residence on Birch Lane was approximately 11 miles from the District office in Juneau.

12. At all times pertinent to the charges YN1 Solorio was on active duty in the U.S. Coast Guard.

13. From 12 October 1980 to 5 June 1984 YN1 Solorio was assigned to the Seventeenth Coast Guard District in Juneau, Alaska.

14. YN1 Solorio is presently on active duty in the U.S. Coast Guard, assigned to Commander, Coast Guard Group New York, Governors Island, New York.

15. All personnel and pay data information on the charge sheet is correct.

16. Coast Guard Support Center New York, Governors Island, New York is an area under the exclusive jurisdiction of the Federal Government.

/s/ RICHARD SOLORIO

YN1, USCG  
Defendant

/s/ ANDREW M. HOCHBERG

Andrew M. Hochberg  
Lt. USCGR  
Detailed Defense Counsel

/s/ FRANK E. COUPER

Frank E. Couper  
LCDR, USCG  
Trial Counsel

BEFORE A GENERAL COURT-MARTIAL COVENED BY  
THE COMMANDER, THIRD COAST GUARD DISTRICT,  
GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Stipulation of Expected Testimony of Jennifer Grantz

It is hereby stipulated, by and between trial and defense counsel with the express consent of the accused, and without waiving the defense's right to object to any portion of this document on any evidentiary grounds, that if Jennifer Ann Grantz were present in court, testifying under oath, concerning whether there is court-martial jurisdiction, she would testify substantially as follows:

I am 13 years old. My date of birth is 23 October 1971. I live at 7862 Americana Circle, #101, Glen Burnie, Maryland 21061. I am in seventh grade at Marley Jr. High. I have no brothers or sisters. My father's name is Frank Grantz and he is a Yeoman in the Coast Guard. My mother is Cathy Grantz. I was going into third grade when we went to Alaska in 1980. I just finished sixth grade when we left. I like to play soccer and bowl. I know Mr. Solorio through my friendship with Brian Solorio and through bowling. He was an instructor in bowling. Mr. Solorio was my soccer coach for the two years I played in Alaska. After soccer, Mr. Solorio would sometimes give us a ride home if my dad wasn't there. My father would usually take me home from bowling. During 1980-81 when I went to Capital School in Juneau. I saw Mr. Solorio once or twice a week at work because after school I went to the district office every day. I would wait there until my father finished work and he would take me home. I would say hi or maybe talk a little about bowling or school. I talked to other people in the office too. After I started school in Mendennall Valley I had other friends who were children of civilians, sometimes I would play at their house and sometimes they would play at mine. I didn't stop by the district office so much. I would only go by the office for ID cards, dental appointments, and things like that. I visited Mr. Solorio at times when I was there but I can't recall if I visited him when I went for ID cards, dental appointments and things like that. I saw



Mr. Solorio in uniform in the office, and a few times at home when he came home from work while I was playing with Brian.

I would go over to play at the Solorio's house one to three times a week while I was in Juneau. Depending on the time I went over there to play, sometimes Mr. Solorio was there, and sometimes he wasn't. Mostly I played with Brian, but when Mr. Solorio was there, sometimes he'd play with us. He taught me some video games.

I knew that he was in the Coast Guard, and that my dad knew him in the Coast Guard. I think that he worked in a different office than my Dad.

/s/ RICHARD SOLORIO

YN1, USCG

Defendant

/s/ ANDREW M. HOCHBERG

Andrew M. Hochberg

Lt. USCGR

Detailed Defense Counsel

/s/ FRANK E. COUPER

Frank E. Couper

LCDR, USCG

Trial Counsel

BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Stipulation of Expected Testimony of Amber Johnson

It is hereby stipulated, by and between trial and defense counsel with the express consent of the accused, and without waiving the defense's right to object to any portion of this document on any evidentiary grounds, that if Amber Lee Johnson were present in court, testifying under oath concerning whether there is court-martial jurisdiction, she would testify substantially as follows:

I am 13 years old. I was born on 12 March 1972. I live in Dale City, Virginia at 4711 Lehigh Court. I am in the sixth grade. Larry V. Johnson and Jo Ann K. Johnson are my parents. My dad is in the Coast Guard in DC at Buzzard's Point. I left Alaska in June of 1983. I had just finished fifth grade. I repeated fifth grade during the one year our family was in Oklahoma before we moved to Virginia. I am now in the sixth grade.

From about 1980 until I left Alaska in June 1983, Mr. Solorio lived next to me. Mr. Solorio worked in the same building as my dad, but I don't think they worked in the same office. I saw Mr. Solorio in uniform both at home and at work. He coached my soccer team for one year when we won the championship in 1982. He was an instructor and kind of an administrator in the city bowling league that I was in. The bowling league and the soccer league were not Coast Guard sponsored. Jennifer Grantz and I were on different bowling teams, but were on the same soccer team. My dad helped with the bowling league and the soccer team on a few occasions, but not regularly. I went over to Solorio's home almost every day or every other day during the week. Sometimes I went over right after school, sometimes later. Depending on when I went over Mr. Solorio was there sometimes. I got home from school before he would get home from work. Sometimes Mr. Solorio would take me home from bowling or soccer and I'd stay at the Solorio's and play with Brian Solorio. Mr. Solorio taught me how to play a computer chess game. I had



other friends who were children of civilians. I would play at their houses sometimes and sometimes they would play at my house.

I usually went over to the Solorio's to play with Brian or to watch the Solorio's cable TV. When Mr. Solorio was there, sometimes he would play too. I became friends with Mr. Solorio after I became friends with Brian. My mom was good friends with Mrs. Solorio—they had garage sales together and both of them had day care centers in the home. My dad and Mr. Solorio were good friends too. I don't know if my father became friends with Mr. Solorio first, or if I became friends with Brian first.

One time I saw Mr. Solorio at his office to get ID cards. He took my ID card picture twice. Each time he snapped the shutter, the camera developed two pictures. The last time he took my ID picture he asked which one I wanted on my ID card. The other time he took my ID card picture he just took the best picture without asking me. When he took the ID pictures a total of four were taken. Before I left Alaska he showed me pictures of me in his wallet. One picture was in black and white, one or two were in color. The black and white picture looked just like the picture taken for the ID card taken of me by YN1 Solorio when I wore pigtails. He never told me the picture was an ID card picture and I didn't ask, but I believe that it was one of the pictures taken at the same time the ID card picture was taken. I looked at the pictures for just a few moments. Mrs. Solorio had taken a number of pictures of my at my house and at hers during the time we lived next to each other. Some of those pictures were taken when I wore pigtails. YN1 Solorio said he kept them to remember me since I was going away. Other than that, he did not say why he had the pictures in his wallet. I think that this was about a month before I left Alaska.

I am in weekly counseling at Northern Virginia Family Services with Dianne Marshall, a social worker who is not a

federal government employee. I would be just as upset and would need counselling if someone not in the Coast Guard had done this to me.

/s/ RICHARD SOLORIO  
YN1, USCG  
Defendant

/s/ ANDREW M. HOCHBERG  
Andrew M. Hochberg  
Lt. USCGR  
Detailed Defense Counsel

/s/ FRANK E. COUPER  
Frank E. Couper  
LCDR, USCG  
Trial Counsel

BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK

DEPARTMENT OF TRANSPORTATION  
UNITED STATES COAST GUARD

COMDTINST 1750.3

8 April 1983

COMMANDANT INSTRUCTION 1750.3

Subj: Family Advocacy Program

1. *PURPOSE.* This Instruction establishes a Coast Guard Family Advocacy Program.

2. *APPLICABILITY.* This Instruction applies to all Coast Guard members, active and retired, and to their family members to the extent feasible. It will apply to members of other Uniformed Services and their dependents to the extent necessary for reporting and treatment. In the absence of agreements to the contrary, responsibility for members and their dependents remains with the parent Service.

3. *DISCUSSION.*

a. The stress military life imposes on families has become recognized as a significant factor in members' performance, and in the morale and efficiency of Coast Guard units. In some families, reaction to stress may take the form of illness, missed work time, poor performance, alcohol or drug abuse, or child and spouse abuse or neglect. When a family reacts to stress in such a manner, decisive command action must be taken.

b. In 1970 the General Accounting Office (GAO) recommended that military service establish family advocacy programs. In 1981 the Department of Defense (DOD) in concert with the Coast Guard, published a joint services directive tasking with service with establishing a Family Advocacy Program tailored to their own needs.

c. The Coast Guard Family Advocacy Program is designed:

- (1) To establish a policy and provide the information necessary for dealing with family violence, abuse, and neglect.

- (2) To provide guidance to commands in the development and identification of family resources to assist all families. These resources could include parenting education through local agencies, counseling, and resettlement assistance, to name a few.
- (3) To educate the Coast Guard community in recognizing the importance of the family's role in mission accomplishment.

4. *POLICY AND PROCEDURE.*

a. Spouse and child abuse or neglect detracts from the efficiency of Coast Guard units, impairs the reputation and prestige of the Coast Guard in the civilian community, and is incompatible with the high standards of professional and personal conduct required of Coast Guard members.

b. To reduce the negative effects of family abuse or neglect, the Coast Guard's policy is to prevent such abuse or neglect through education, through discipline of criminal acts when appropriate, and through rehabilitation of military personnel who have the potential for future useful military service without further abusive incidents.

c. When cases of abuse or neglect involving persons subject to this instruction come to the attention of commanding officers or officers in charge, commands will take actions using the following guidelines:

- (1) Protect and treat the victim as prescribed in the Family Programs Handbook;
- (2) Treat the abuser at the appropriate facilities, as defined below, to the extent the individual's motivation and the nature of his or her problems permit;
- (3) Preserve the family unit to the extent that is in the best interest of the family as determined by those professionals providing treatment and by the family's wishes; and
- (4) Initiate administrative or disciplinary actions which should, in the judgment of the commanding officer, result from the incident. The seriousness and the type of injury to the victim, as well as the extent to which treatment of the abuser is likely to prevent repetition, should be factors in this decision.



d. Reports will be submitted to local authorities as required by law. Such reports may lead to civil investigations and court actions. These actions should be considered separate from military procedures initiated by commands.

e. The diagnosis of child or spouse abuse requires specialized professional screening and treatment. The Coast Guard's policy is to identify and utilize Uniformed Services Medical Treatment Facilities (USMTF) Family Advocacy Programs for screening, treatment and referral. When there is no USMTF in close proximity to a Coast Guard command, local or state facilities providing services to abused families are to be used.

f. Exclusive Federal jurisdiction will be relinquished subject to military needs, to the extent necessary, to ensure that state laws on child and spouse protection apply on Coast Guard installations. Commanding officers and officers in charge are urged to work closely with military, state, and local judicial systems to define geographic areas of jurisdiction (exclusive, concurrent, partial, or proprietary) to ensure interagency support and cooperation.

g. Certain forms of abuse or neglect are criminal acts. The Family Advocacy Program is in no way intended to replace or impede the appropriate use of the Military Justice System, investigations convened under the UCMJ, or the use of Coast Guard investigators as deemed necessary by the commanding officer. Due to the sensitivity and delicate nature of interviewing persons subjected to these types of criminal acts, especially child victims, adequate training of investigators is mandatory.

h. Commanding officers and officers in charge should ensure that a full, discreet inquiry is conducted into each case of suspected abuse or neglect. Members conducting inquiries should be aware that complex, volatile emotions are involved in such cases, including those of the investigator. An accusation can place professional standing, social acceptance and career progression at risk. Therefore, accusations and classifications of individuals short of judicial conviction, or administrative determinations incident to separation from military service, shall be protected with the highest degree of

confidentiality. Disclosure of information regarding incidents of family violence should be to only those individuals who have an absolute need to know, and must be made only in accordance with the Privacy and Freedom of Information Acts Manual (COMDTINST 5260.2).

i. District commanders shall identify units which will provide family advocacy support to commands throughout the district, including the district staff. These units shall designate a Family Advocacy Representative selected on the basis of criteria contained in enclosure (2). Commanding officers of units with Family Advocacy Representatives may form Family Advocacy Committees. Family Advocacy Representatives will determine which state, local, or military facilities will be utilized by the commands he or she serves, among other functions listed in enclosure (2). The commanding officer of each Headquarters units will also designate a Family Advocacy Representative. District Commanders shall designate a member of their staff to coordinate the Family Advocacy Program district-wide.

j. Commandant (G-P) and (G-K) will jointly manage the Family Advocacy Program through a Central Family Advocacy Committee composed of personnel appointed from each office. The size of the committee will be determined by program demands. The Committee shall meet as necessary and not less than quarterly to review documentation on

(The remainder of this Commandant Instruction was not entered into the record)



BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Request for Judicial Notice

Pursuant to MRE 201 the Government requests that judicial notice be taken of the following policies of the United States Coast Guard contained in the Coast Guard Personnel Manual COMDTINST M1000.6:

- a. Chapter 4-A-12 Unrestricted assignment
- b. Chapter 4-E-26 Humanitarian Transfer

The government requests that judicial notice be taken of the geographic relationships of the communities in the Juneau area, and the approximate population of Juneau, the geographical and topographical boundaries of Juneau., the street map of the Mendenhall Valley and Glacier Park housing areas. (See attached map.)

/s/ FRANK E. COUPER

Frank E. Couper  
LCDR, USCG  
Trial Counsel

(Certificate of Service omitted in printing).

Coast Guard Personnel Manual, COMDTINST M 1000.6

4-A-12 AVAILABILITY OF PERSONNEL FOR UNRESTRICTED ASSIGNMENT

A. There is a growing trend in society toward families headed by a single parent. It is no longer automatic that children remain in the custody of their mother following divorce or separation, and many single fathers are raising their children unaided. It is also becoming commonplace for an unmarried woman to be raising children.

b. Caring for children without the aid of a spouse is a difficult and demanding task for a civilian parent because of the press of duty, it can be even more difficult for a military parent. It has always been an integral feature of military service that a member is on call 24 hours a day and subject to transfer on a worldwide basis. Unusual and irregular working hours are a regular part of many Coast Guard assignments. These features sometimes create difficulties for both the member and the Coast Guard when the member is a single parent of young children.

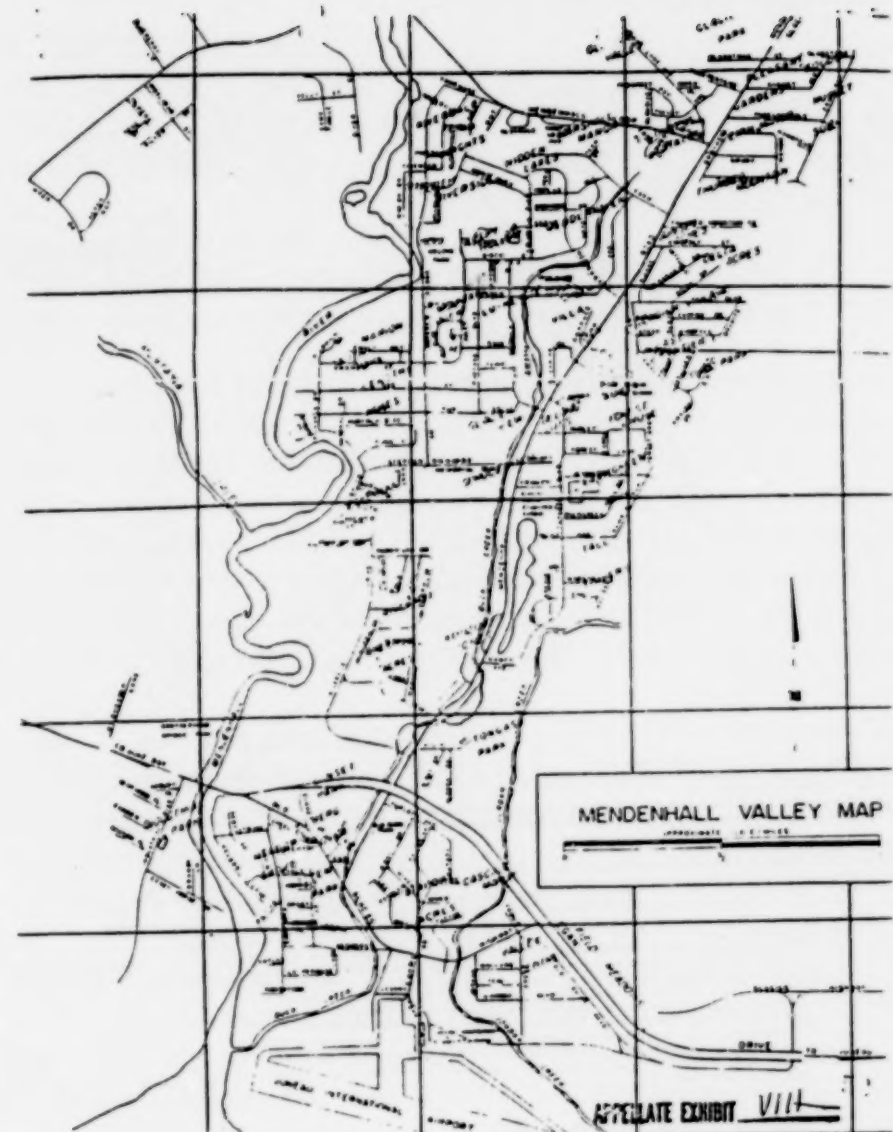
c. It is the Commandant's policy that all members of the Coast Guard be available for unrestricted duty assignment. It is manifestly unfair and impractical to grant exceptions to this policy to certain members. Where for any reason a member is not available for unrestricted assignment for an appreciable period, the best solution is usually separation from the Service. Where there is an indication that the problem can be resolved, the Commandant will grant a reasonable time (4 months) for the member to solve his or her problem and once again become available for full duty.

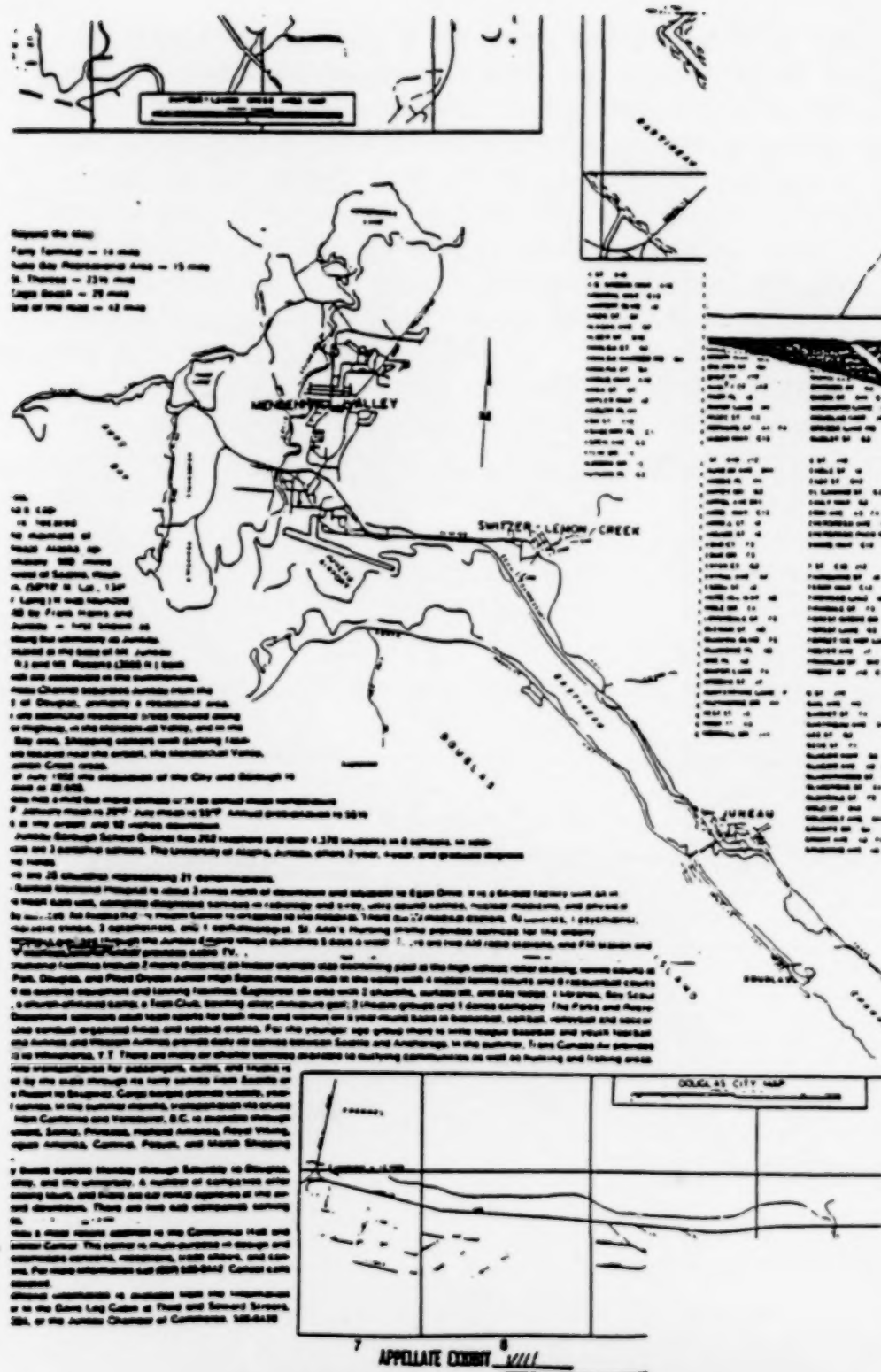
d. Commanding officers and officers in charge are expected to show sympathy and compassion for the problems of their personnel. They shall not, however, accept less than unrestricted availability for regular duties and watches.

e. Single parents who request exception from normal job requirements shall be counseled that arrangement for the care of their children is the responsibility of the parent and that the Coast Guard had the right to expect that their status as single parents will not interfere with the full performance of their duties.

f. Where the member is not fully available for duty, the problem cannot be resolved locally, and it appears to be relatively short-term in nature, the member should be advised to submit a request for humanitarian assignment, documented in accordance with article 4-C-26. If granted a humanitarian assignment, the member will not be permitted to reenlist until the documentation required by article 4-C-26 that "the hardship situation is completely resolved and the member is available for unlimited assignment in accordance with Service needs," is submitted.

g. Where there is no clear prospect for unrestricted availability in the near future, the commanding officer should recommend that the member be separated in accordance with article 12-B-13.





BEFORE A GENERAL COURT-MARTIAL CONVENED  
 BY THE COMMANDER, THIRD COAST GUARD  
 DISTRICT, GOVERNORS ISLAND, NEW YORK

R 160803Z MAY 85  
 FM CCGDSEVENTEEN JUNEAU AK//DCS//1/2  
 TO ALLCOGARDSEVENTEEN  
 ACCT CG-W2GNRC  
 BT  
 UNCLAS //N05810//  
 UNNUMBERED ALLCOGARDSEVENTEEN  
 SUBJ: Good order and discipline

1. Provided below are the results of recent court-martials held in the district and recent prosecutions by the State of Alaska of Coast Guard personnel.

A. A FN was convicted by a special court-martial of violating article 112A UCMJ. The offenses involved two specifications of distribution of cocaine and one of use of cocaine. The sentence awarded was reduction to E-1, two-months confinement, and forfeiture of 410 dols per month for two months.

B. A SN was also convicted by a special court-martial of an offense involving a controlled substance. Specifically, he used cocaine in the presence of the duty MAA. The sentence awarded was reduction to E-1, four months confinement, and forfeitures of 413 dols per month for four months.

C. A YN2 and a SA have been tried and convicted in the Alaska State courts on the charge of sexual abuse of a minor in the second degree (in this case, rape). This is a felony offense. The SA was sentenced to five years imprisonment with four years suspended. Sentencing for YN2 still pends.

D. A BM1 has been convicted by the Alaska State courts on 3 counts of sexual abuse of a minor in the second degree. These offenses involved his own children. He was sentenced to imprisonment for three consecutive 10 years terms, resulting in a total sentence of 30 years.

BEST AVAILABLE COPY



2. These results should be made known to all hands. The court-martials are indicative of the district commander's intention to prosecute (and not merely administratively discharge) members engaged in the distribution of illegal drugs or their use under aggravating circumstances.

3. The state prosecutions should serve to remind all military personnel of the fact that the state of Alaska's criminal jurisdiction includes all military bases in Alaska, Coast Guard members are not immune from prosecution by the state due to their military status or because they may live and work on a Coast Guard installation. Offenses involving civilian victims, including dependents, may well end up in state court even if the accused is a member of the Coast Guard and the offense occurred on Coast Guard property.

4. It is apparent that the sentence in the state courts can be substantial. Moreover, these proceedings should impress upon our people the fact that the Coast Guard and society in general, intends to hold an individual fully accountable for any criminal acts he or she may commit. In the recent past, criminal abuse of minors and family members was often not reported and even less frequently prosecuted. This is no longer true. Individuals found to be engaged in such conduct will be prosecuted to the fullest extent possible.

BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Stipulation of Expected Testimony of Louis Menendez

It is hereby stipulated by and between trial counsel and defense counsel with the express consent of the accused without waiving the defense's right to object on evidentiary grounds, that the following facts are true:

1. My name is Louis James Menendez, Esq. I am an Assistant District Attorney for the First Judicial District, Criminal Division, Department of Law, Alaska. I was responsible for the decision to defer prosecution of YN1 Richard Solorio to the legal prosecutorial arm of the Coast Guard.

2. Should the Coast Guard determine, however, that the court-martial is without jurisdiction to prosecute this case, the District Attorney's office would reconsider its decision not to prosecute. There is no present statute of limitations problem with regard to this case.

/s/ RICHARD SOLORIO

YN1, USCG  
Defendant

/s/ ANDREW M. HOCHBERG

Andrew M. Hochberg  
Lt. USCGR  
Detailed Defense Counsel

/s/ FRANK E. COUPER

Frank E. Couper  
LCDR, USCG  
Trial Counsel

BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE - COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK

Transcript of Proceedings on Motion to Dismiss

[10] DC: Your honor, the defense has several motions. The first motion the defense will begin with is the motion to dismiss Charge I Specification 11 through 15, Charge II, Additional Charge I, Additional Charge II, Specifications 1 and 2, and Additional Charge III as not being within the subject matter jurisdiction of this court-martial and should be dismissed.

MJ: You have the original or does the reporter have the original of your motion papers for marking as Appellate Exhibit on this motion?

DC: Not at this time sir.

MJ: Lets deal with your motion papers and the government's response so that they can be Appellate Exhibits in order.

[The reporter was provided with the defense's motion to dismiss and the government's response. The motion to dismiss and its attached memorandum of law was marked as Appellate Exhibit II and the government's response was marked as Appellate Exhibit III.]

MJ: Do you have anything further now on the motion?

DC: I choose to argue the motion after evidence has been presented sir. The basic gist of the motion is that offenses took place off base involving civilian dependents, there was no military property involved, no security of the base involved, the integrity, security, morale, reputation of the Coast Guard is only remote. The 12 *Relford* factors are not in consideration - the *Relford* considerations have not been met and cannot be met.

TC: Your honor, the government opposes the motion. The government has a stipulation of fact for purposes of this jurisdictional motion and also two stipulations of expected testimony; one for Jennifer Ann Grantz and the second for Amber Lee Johnson. I ask that these documents be marked as Appellate Exhibits IV, V and VI.

[11] [The reporter was provided with the government's three stipulations. The stipulation of fact was marked as Appellate Exhibit IV, and the stipulations of expected testimony of Jennifer Grantz and Amber Johnson were marked as Appellate Exhibits V and VI respectively.]

DC: Your honor, just a point, I just realized I do not have my copy of the stipulation of fact with me and I ask that we break so that I may make a copy.

MJ: Well, I will want to go over with the accused these stipulations at least his understanding of them, I think that would be appropriate that you have a copy before you when I do that.

DC: Let me just check one other place. I am sorry for the delay your honor, I do have a copy.

MJ: So you are ready to proceed?

DC: I am ready.

TC: Your honor, the government also has two request for judicial notice; the first requesting that judicial notice be taken of Commandant Instruction 1750.3 the Family Advocacy Program and Commandant Instruction Pamphlet 1750.4, certain pages and the second request for judicial notice, I request judicial notice be taken of Chapter 4-A-12, unrestricted assignment and Chapter 4-C-26, humanitarian transfer of the Coast Guard Personnel Manual.

DC: Your honor, the defense would object to you taking judicial notice the both aforementioned items. The prosecution apparently would seek to have you judicially notice these items to demonstrate that there has been an effect on the morale, discipline, security of an individual base to show that it also effected military readiness. Those matters are properly received in evidence and should not be establish by Coast Guard or military policy. Whether or not an individual is prepared to go on restricted transfer is a question for the member and should be properly placed before the member. Whether there are Family Advocacy Programs available or Coast Guard personnel available to assist with particular family problems is not an issue properly before the court. If Coast Guard personnel have been involved, then that is also a proper matter for testimony and should not be judicially



noted. Those matters are relevant and policy should not be a standard of which we measure service connection in these offenses. The facts and circumstances of the specific offenses should be determined. As many of the cases from *O'Callaghan* on have mentioned analysis that a case by case offense by offense [12] analysis. Policy should not be the standard by which we measure that case by case analysis.

MJ: Let me back up a minute before we get too far ahead of ourselves and have things pending. Before I deal with the judicial notice let go back to the stipulations were we started here. Petty Officer Solorio—first of all, let me clarify from the government, these stipulations are offered only for purposes of the motion before the court.

TC: That is correct your honor.

MJ: That's the defense's understanding as well?

DC: Yes your honor.

MJ: I've been presented with Appellate Exhibits IV through VI titled Stipulation of Fact and two Stipulations of Expected Testimony. I do see your—

DC: Before we proceed with that, the defense also has a stipulation of expected testimony it would like to present. Would you like the defense to wait until we resolve this issue or go forward with all four stipulations?

MJ: Lets bring in the defense's evidence at the appropriate time and I can make reference back to these instructions if need be. I see on each of the stipulations I have before me your signature. Do you understand what is contained in the stipulations?

ACCUSED: Yes your honor.

MJ: Do you understand how the stipulations are being used?

ACCUSED: Yes your honor, as testimony and as fact.

MJ: Do you further understand that even at this point before I agree to except these stipulations you may withdraw from them?

ACCUSED: Yes your honor.

MJ: So even though you have signed it you may withdraw from testimony or ask to withdraw from the stipulation and if you have a good reason for that I'll allow it. You shouldn't

enter into a stipulation unless you are satisfied that it is in your own best interest to do so. Do you understand that?

ACCUSED: Yes your honor.

[13] MJ: So with respect to the stipulations of expected testimony you do agree that those witnesses named, if present in court, that is what they would say and that you want to enter into this and want me to consider this testimony in that form as well.

ACCUSED: Yes your honor.

MJ: The three offered stipulations four, five and six are accepted. Are these copies available?

TC: Yes your honor, I believe I put copies on the bench earlier. May I approach the bench your honor?

MJ: You may.

MJ: Copies have been found, thank you. Now, turning to the judicial notice matters, did the government want to be further heard in view of the defense objection?

TC: Your honor, with respect to the judicial notice of Coast Guard Personnel Manual provisions, those provisions although they are matters of policy they are also facts that the Coast Guard does have those policies. Particular application of the *Relford* factors to each individual case always relies on a policy whether the policy is judicial or a policy is determined by regulation or the law. These Coast Guard policies are in effect the law of the Coast Guard. Should there be testimony in this individual case that for some reason the availability for transfer of the military members affected is restricted and these members cannot be assigned world wide that would obviously have an impact on the Coast Guard whether or not we had this policy. However, the existence of the policy adds to the distinct military interest and that is one of the factors your honor has to take into consideration. It would be an impact with or without the policy but the factual existence of the policy makes that military interest more distinct. With respect to the judicial notice of the Family Advocacy instructions I believe would be a matter of facts that they be judicially noticed without the instructions that Coast Guard families could either be supportive or nonsupportive of a member, and that in essence is what that instruction—the



policy in that instruction. If the testimony in this individual case is that acts of the accused were destructive to the family and that created an injury in fact to a military member, the moral of the service, once again that impact would [14] be one the *Relford* factors without the policy contained in Commandant Note 1750. But with Commandant Note 1750, the military interest becomes more distinct and is more precise. That is all I have your honor.

MJ: You just said Commandant Note, you mean the Commandant Instruction?

TC: Excuse me, Commandant Instruction 1750 and the pamphlet instruction.

MJ: As part of the pretrial papers provided to me, there was an additional matter on the second request for judicial notice on a—referring to the geographic relationships of the communities in the Juneau area, approximate populations and an attachment of a couple of maps. Those have not now been offered, what is your intent there?

TC: Yes, your honor, I would ask that you take judicial notice of the geographic relationships in the Juneau area for purposes of this motion only and I would ask defense counsel if he objects to that portion of it. Once again, that is just for purposes of the motion.

DC: I believe that in either case the geographical relationships can be offered as a Prosecution Exhibit and might be best in that record that way. If the prosecution does have members who can lay a foundation for those maps, the defense would not object—would stipulate to the admissibility of them as Prosecution Exhibits.

MJ: Well. Prosecution Exhibits would be on the merits, I want to deal with the motion offerings right now. If they are offered they are offered as Appellate Exhibits and then we will separately offer them, at the appropriate time, if they are to become Prosecution Exhibits on the merits. So, even at the expense of a larger record we are not confusing ourselves or the members.

DC: I would have no objection to taking judicial notice of the maps.

MJ: Have the originals of those request for judicial notice been provided to the reporter?

TC: No your honor, I have them.

MJ: They should be marked as Appellate Exhibits in order.

[The reporter was provided the government's requests for judicial notice and marked them as Appellate Exhibits VII and VIII.]

[15] MJ: You have no written objection?

DC: No your honor, I do not. Your honor, there are two request for judicial notice, which one will be the first?

MJ: The first will be the two Commandant Instructions was the order presented followed by the two excerpts from the Personnel Manual. Included with the Personnel Manual excerpts were the maps.

DC: Thank you sir.

MJ: I certainly hear and understand defense counsel's argument on the relevance of this matter, nevertheless I am going to overrule your objection and for purposes of the motion only, take note of the requested instructions and Personnel Manual statements in the sense that this motion deals with service connection and the matters that may be of significance there in the *O'Callaghan* decision cited may be brought wide range. At the same time how these policies become relevant or are applied for purposes of this motion I am not deciding in this, but I will consider and take judicial notice of these matters and take into account in deciding the motion. I will also accept the maps which were not objected to and the representations contained thereon as of the dates included thereon which may or may not be entirely relevant, certainly geographic relationships, places don't change, populations do, streets grow, Juneau has been a boom town, I knew that from being there. What I also would take judicial notice of I guess—no I am not going to take judicial notice of that, but what my concern is that if we get to using these on the merits nail down a particular date or whatever as to when these are effective for. A map is a representation of a place at a particular time and I will take as the time represented here on the maps which is sometime in 1982.

DC: Your honor, do you have the original of the maps or copies?

MJ: I have a copy. The original is here, I will inspect it. The original appears to be a copy. My concern between what I have been provided as a pretrial and what has been marked as Appellate Exhibit VIII is that there was an individual street map of the Mendenhall Valley that is not appended to the Appellate Exhibit VIII, should it be?

TC: Yes your honor it should be.

MJ: In addition to an overall area map which contains a good bit of verbal description which is appended to Appellate Exhibit VIII, I had received a page entitled Mendenhall Valley map.

[16] TC: If I might substitute this copy for the copy in the record your honor, this one does have the Mendenhall Valley map in it.

All we need is that last map which the reporter can take care of putting together.

[The reporter was provided the Mendenhall Valley map and appended it Appellate Exhibit VIII.]

MJ: You had no objections that it include both maps?

DC: No sir.

MJ: It did not.

DC: I have no objections to including both maps.

MJ: All right. Your may proceed trial counsel.

TC: Your honor, the final documentary matter is a letter from the Alaska Attorney General and deferring the Coast Guard's prosecution of this case with respect to the Alaskan offenses and a unnumbered ALLOGARDSEVENTEEN date time group 160803Z May 85 and I would ask that these be marked as Appellate Exhibits IX and X. Copies have been provided.

[The reporter was provided with the letter from Alaska and the ALLOGARD message and marked the them as Appellate Exhibits IX and X respectively.]

DC: Your honor, the defense objects to the receipt into evidence of Appellate Exhibit IX, the letter from Alaska, as being hearsay not within any hearsay exception. Whether or not Alaska has deferred prosecution of this case, it is clear

from the facts of the case and also from the government message that Alaska does prosecute cases of child abuse and this is a case that is traditionally prosecuted in civilian courts. The issue is not whether Alaska has deferred, but whether it is traditionally prosecuted.

MJ: Put your objection together form me, you are abjection on hearsay grounds or relevancy grounds on the issue? I heard your objection I am just having trouble putting your statement together with your argument.

DC: I am objecting on two grounds, hearsay and relevancy. It is clear that Alaska does prosecute these cases, that it is traditional;y prosecuted in civilian courts and it is hearsay because it is an out of court statement offered for the truth of [17] the matter asserted not within any hearsay exceptions. As far as relevancy is not whether they have deferred but whether they are open and available.

MJ: Trial counsel response?

TC: Yes your honor, for preliminary questions the judge is not bound by the rules of evidence except those with respect to privilege Rule 104. With respect to this letter from the Attorney General, it is a traditional way in which expressions of deferral are presented to Coast Guard Court-Martial, promotes judicial economy, there isn't any question as to the authenticity of the letter, the original is signed, the defense counsel has spoken to the person who wrote it. Government has stipulated to an addition to that letter because the defense has not received a written response. Defense has had adequate opportunity to detest the authenticity of the letter and has done so.

MJ: The objection was not on authenticity grounds.

DC: No sir, it was not.

TC: As an alternative the government would offer it under the other exceptions under Rule 803(24) and 804(b)(5) as having adequate indecia of truthfulness of the facts asserted therein.

DC: I would note your honor, that the defense has not received the required notice of Rule 803(24) and 804(b)(5) and that it does not answer the relevancy objection.



MJ: You are not objecting to Appellate Exhibit X, the message?

DC: No sir.

MJ: We are only dealing with Attorney General letter.

TC: Your honor, although it is not usually necessary to go into some of the hearsay exceptions for this purpose, it would appear that the letter does reflect the existing state of mind of the declarant. It is not offered for the truth of the matter asserted therein, but for the declarant's state of mind, a decision is made, the reasons for it. Given that it would appear to get over the hearsay exception, particularly since it also has other indications of trustworthiness, defense counsel has had the opportunity to call him up and determine the authenticity which he is not objecting to. That appears to get over the two major problems with the admissibility of the letter. For instance, the letter declares it is a Coast Guard policy, well if that letter is not being presented for the truth of that matter asserted but only as a recorded document a document which records the state of mind of the person sending the letter.

[18] MJ: Response.

DC: Your honor, it is not a question of the state of mind of the person sending the letter, if the state of mind was simply that it was deferring prosecution that might be one thing, I had no intention to prosecute the case at this particular time, that is one thing, but whether it goes on and on stating Coast Guard policy stating what the Coast Guard interest is and finally stating that Alaska is concerned about the expense that might be incurred by Coast Guard personnel. At sole surplusage it has no relevance to the issue at this time. I cite *United States v. McCarthy* cited in my brief in support of my motion to dismiss, *McCarthy* notes that the fact that a civilian court is less interested in prosecuting is not relevant to the determination. What is relevant is are they available, Alaska is available. I stress my objection again in relevancy especially considering the surplusage that is contained in this letter. The defense will stipulate, however, that Alaska has deferred prosecution at this time.

MJ: I am not going to except oral stipulations. If there are going to be stipulations offered they will be in writing to accordance with the rules. If counsel want to get together on that side of things to offer stipulations and try to agree on them, that is one thing, but lets not do it orally. Let me defer—let me accept Appellate Exhibit X and defer on Appellate Exhibit IX for the moment.

TC: The government would call Chief Telephone Technician James R. Truby.

DC: Your honor, at this point the defense would request a brief recess before we begin taking testimony.

MJ: Are you looking for a noon recess or just—

DC: Brief recess.

MJ: We will reconven at 1145, the court will be in recess.

The 39(a) Session recessed at 1150 hours, 3 June 1985.

The 39(a) Session was called to order at 1145 hours, 3 June 1985.

MJ: Please be seated, the Article 39(a) Session will come to order.

TC: Your honor, all persons who were present when the Article 39(a) Session recessed are again present, no person [19] required to be present is absent. Chief Telephone Technician James Truby is in the courtroom and on the witness stand.

Chief Telephone Technician James R. Truby, U.S. Coast Guard, was sworn, and testified as follow:

#### DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name, the organization you are attached to and your service.

A. James Ross Truby, Telephone Technician Chief, Electronics Engineering, Third Coast Guard District, U.S. Coast Guard.

Q. Chief Truby where do you live at the present time?

A. Barracks 513 sir.

Q. On Governors Islands?

A. Yes.



Q. Where were you assigned previous to your assignment on Governors Island?

A. Group Seattle Washington sir.

Q. And your assignment previous to that?

A. Seventeenth district triple e.

Q. During what period of time were you in the seventeenth district?

A. Between the summer of 1979 and the summer of 1982.

Q. What city did you reside in?

A. Juneau Alaska.

Q. Do you have a family Chief?

A. Yes I do sir.

Q. What does that family consist of?

A. I have a wife and two children. My children's ages are presently 16 and 11 and they are daughters.

Q. Did you accompany you on your tour in Juneau Alaska?

A. They did sir.

Q. Where did you live in Juneau?

A. I lived in the Mendenhall Valley area in a section of that area called Sleepy Hollow on McGinnis, I believe the address was 4407 McGinnis.

[20] Q. Were you familiar with Petty Officer Solorio when you were in the seventeenth district?

A. I did know Petty Officer Solorio was stationed in the district and yes I had talked to him sometimes, but I was not socially associated with the man.

Q. Do you know where he lived in Juneau.

A. No sir I understand he was in the Mendenhall Valley but I did not know where his home was.

Q. About how far is it from the Mendenhall Valley - was your house government housing or private housing?

A. It was private housing sir.

Q. Purchased or leased?

A. I owned by home.

Q. Is there or was there any government housing in the Juneau area for Coast Guard personnel?

A. The only government housing I am aware of was the Admiral's quarters the rest was purchased or leased.

Q. In general how did personal attached to the seventeenth district office in Juneau obtain housing.

A. Routinely sir the people would come and go into temporary quarters while they hunted for a house to either buy or rent, lease, whatever and this would generally require the man's wife to go out and get a job and qualify for a loans and so on so they could by a home.

Q. Did some people rent?

A. Yes sir, I am not aware specifically of people who rented but yes some people did rent. There were people who owned homes up there who would lease them out hoping to return sometime and some people who lived there who own more than one home for income property.

Q. How would you characterize the cost of housing in Juneau Alaska?

A. Extremely high sir. Very difficult to get at that particular time and at the time I got there was a volital time that is when the market rates for money were fluctuating up and down.

Q. Due to the high cost of housing is there any assistance available to Coast Guard personnel assigned in Juneau Alaska?

DC: Objection, counsel is testifying on the basis for whether any housing assistance is based on the high cost of housing.

[21] MJ: Objection is overruled, the witness can answer if you can.

WITNESS: Will you restate the question sir?

Q. Is there any Coast Guard assistance of any kind available to obtain housing in the Juneau area?

A. Although I didn't personally use it, there were some loans available through the moral people that could be made for specifically closing cost and things of that type. I am not aware of any other.

Q. Were there any standard allowances available to assist in making house payments?

A. Yes sir, at the time that I got there we were on what we call HOLA and COLA which effectively doubled my pay when I got there. It was a substantial amount and helped me make my payments on my home which were rather high. The problem was that you had to qualify for the loan—qualify for the home which meant your income had to be substantially high than that even. Most of the time the wives had to work.

Q. What was the distance from the Mendenhall area to the district office?

A. I estimated it at right in the neighborhood of eight to ten miles.

Q. In the Mendenhall area can you estimate what percentage of people in that area were Coast Guard families?

A. I think that—well there are a substantial number of people living in the Mendenhall area that were associated with the Coast Guard in some way and I would say, as long as nobody holds me to it, somewhere in the neighborhood of one and six maybe.

Q. Who were the major employers in the area?

A. The major employers as far as I know in the order of the most people employed would be the State of Alaska, I believe the Forest Service and then the Coast Guard. I guess it would be safe if it is not forest service it would be very safe to say the State of Alaska and the Federal Government were the largest employers in that town.

Q. In the Mendenhall Valley area did neighbors tend to show the employment of their close neighbors?

DC: Objection, Chief Truby can't testify what other neighbors knew.

MJ: Sustained.

[22] In the Juneau area what was the reputation of the Coast Guard?

A. Extremely good sir, extremely good.

Q. Do you have an opinion as to why the Coast Guard's reputation was so good?

A. Yes sir, the Admiral upon arriving in Juneau routinely had all the Chief Petty Officers when they did arrive once a month, come in to visit him. We were encouraged to become active citizens in the town and we were told at that time that

the Coast Guard was expected to be a good citizen in the town and that our participation in the different activities that the people had in the area was encouraged. Chief Petty Officers had activities that dealt with the senior citizens dinners and so on that was a real social event for the people in the neighborhood. We put it on once a year for senior citizens and it was a sit down meal for those people, a real social event for them and the only price of admission was proof that they were over 65 years old.

Q. Was there any concrete manifestation of the high reputation of the Coast Guard that you can recall? Did Coast Guard personnel receive any special considerations that you should attribute to the high reputation of the Coast Guard?

A. Yeah, one of the things that took place was that when I got there my wife had no trouble getting a job whatsoever. They would ask her what does your husband do and she would indicate that I was working in the Coast Guard and the people would automatically know that they had someone who would be there for three years minimum. You are respected in the town, you are accepted, your financial problems that you have in most towns weren't as difficult in that town and I think that because they had such a high number of retirees from the Coast Guard you are excepted in the town almost immediately. It wasn't the six month learning curve like you have in most towns.

Q. If a Coast Guard active duty person sexually abuse a daughter of another Coast Guard active duty person in Juneau Alaska, what effect would that crime have on the reputation on the Coast Guard in the community of Juneau.

DC: Objection, it is pure conjecture on the part of the witness. He is not present in Juneau, he has not stated that he knew of any such instances while he was in Juneau, he can only base an opinion on pure conjecture.

MJ: Sustained as to the form of the question.

Q. Would there be any effect on the reputation of the Coast Guard—

[23] DC: Again, objection the form has not substantially changed he is asking for the same knowledge, the same conjecture that the witness does not or cannot have.



TC: Let me try rephrasing it.

Q. Do you have an opinion as to whether there would be any effect on the reputation of the Coast Guard should a Coast Guard individual sexually abuse dependent in the Coast Guard?

DC: I renew my objection your honor, again it requires some basis.

MJ: Overruled.

TC: I have not asked you your opinion only if you have one.

WITNESS: Yes I have one.

Q. What would be the basis of that opinion?

A. The basis of my opinion would be that in that town the news papers had what they called Police Blotter and different things that took place in the town, drunk driving incidences or anything like that people were arrested for whatever, their names would be put in the Police Blotter and what they were charged with. From that standpoint this is true of a lot of towns not just Juneau, but the people would state who was arrested for what and in the case of a Coast Guardsman, as we all know, they would also state that he was of the Coast Guard as part of the statement of identifying the person. I believe from that standpoint—have you asked me for my opinion?

TC: Not yet.

WITNESS: I better stop then. That is my basis.

Q. In your opinion would there be an impact on the Coast Guard's reputation if such an incident of child sexual abuse occurred.

A. Yes sir, I believe there would be. I believe it would be substantial for a short period of time and then the Coast Guard's good reputation would prevail over a longer period of time. The town is a very cohesive town, very together bunch of people and I am sure that if something like this was to happen they start inspecting more of their activities where adults supervising children and insure to themselves as best they could that this would not happen again.

Q. You mentioned in your testimony that Coast Guard personnel are encouraged to volunteer, if the Coast Guard perpetrator of a sexual abuse incident against a Coast Guard

[24] dependent were also very involved in children's activities in the city of Juneau, do you believe there would be any impact on the Coast Guard's volunteerism?

DC: Objection.

MJ: Sustained.

TC: Your honor, I'll ask him his basis for that.

Q. Do you think there would be an impact on the coast Guard's volunteerism.?

DC: Excuse me your honor, I believe that my objection was sustained.

TC: Pardon me.

Q. If such an incident of child abuse in Juneau Alaska by a Coast Guard person against a Coast guard dependent were revealed, do you have an opinion as to whether there would be an effect on the morale of the Coast Guard people up there?

A. Yes sir I do.

Q. What is the basis for your opinion?

A. I believe that—putting that question to myself, if I was active with children, say as a youth adviser or something like that, I would become under inspection and it would set me off center—

MJ: Excuse me, once again Chief you have been asked for the basis of your opinion not the effect that it would have on your or anyone else but why you think what you do think.

WITNESS: I believe it would have an effect on me and I believe it would be because I would come under inspection as far as my integrity is concerned. If I was dealing with children I would be looked at in at negative light until I proved myself otherwise.

Q. You stated that you had children up in Alaska.

A. Yes sir, I had two.

Q. If such an incident of a Coast Guard individual sexually abusing Coast Guard dependents came to light, do you have an opinion as to whether it would effect morale personally, in your personal and family life?

A. Yes I do.

Q. And what is the basis for that?



[25] A. It would create worry on the part of my wife and my self as far as our children are concerned there and from that standpoint my morale would be an unsure type thing, I would be unsettled.

Q. When you are transferred—how many times have you been transferred in the Coast Guard?

A. Bunches of times.

Q. How long have you been in the Coast Guard?

A. I have been in the Coast Guard off and on for the past 20 years this month with a three year nine month stay out of the Coast Guard. I never really counted the number of transfers I have had sir, but I have two three year tours and the rest are less than that and three of them are nine months.

Q. When you and your family are transferred is there some group of people you rely on most when you need help?

A. Yeah, we rely on ourselves and the Coast Guard people at the other end of the line to sponsor us and get us in to the neighborhood and so. The sponsor program is a very important program.

Q. Do you normally know your sponsor a head of time?

A. I would say it is about a 50/50 time that I know the person. In the case of my Alaska transfer, yes I did know my sponsor.

Q. Would the revelation of a Coast Guard active duty person sexually abusing dependents of Coast Guard active duty personnel, would that have any effect on the way you trust other Coast Guard people?

A. I think so from the standpoint that I assume that I know a person a little bit better I guess because I am associated with them in the Coast Guard. I would trust them because of that association in some instances. This would make me a little more leery, yes. It would make me aware of the fact that it can happen closer to home than you think.

Q. Do you know Frank Grantz?

A. Yes sir, very well sir.

Q. How did you come to know him?

A. He was our Yeoman in the office I worked in.

Q. Where?

A. Electronics engineering at district Seventeen.

Q. Can you just describe some of his salient characteristics since he has not appeared before this court?

[26] A. Frank Grantz is a very big man, he's very strong individual at the same time he is child like in some ways.

DC: Objection your honor, I believe the question asked for physical characteristics.

WITNESS: I am sorry, I didn't understand the question.

Q. Are you aware of the general nature of the allegations that are before this court?

A. Yes sir.

Q. Have you spoken to Frank Grantz about these proceedings or the events leading up to it?

A. Not about the events leading up to, I ran into Frank several weeks ago when he was onboard the Island and I asked him what he was here for and he told me it was an Article 32 hearing. I asked what was it about and at that time he did not answer me, he indicated that there was a problem with his family and began to cry and I backed off and didn't ask any more questions. After that I found out what it was through the questioning prior to coming here, you and the defense attorney asking me questions about it.

TC: That is all I have your honor.

MJ: You may cross-examine.

DC: Your honor, do you wish to proceed with cross-examination now or break for lunch and we could continue with cross-examination after recess.

MJ: Do you have an estimate how long you are going to be?

DC: Between ten and twenty minutes.

MJ: I think we had better break. Chief I will have to ask you to return and not discuss your testimony or your knowledge of the case with anyone other than counsel during our recess. The court until 1300 hundred will be in recess.

The 39(a) Session recessed at 1210 hours, 3 June 1985.

The 39(a) Session was called to order at 1300 hours, 3 June 1985.

MJ: The Article 39(a) Session will come to order, please be seated.

TC: Your honor, all persons who were present when the Article 39(a) Session recessed are again present, no person

[27] required to be present is absent. The witness is still on the stand.

MJ: You are still under oath.

WITNESS: Yes sir.

MJ: You may proceed.

DC: Thank you your honor.

### CROSS-EXAMINATION

Questions by the defense:

Q. Chief when you were stationed in the Seventeenth district, you said you lived in Juneau?

A. Yes sir.

Q. Specifically where did you live?

A. 4407 McGinnis.

Q. Was that in Juneau itself or in Mendenhall Valley?

A. Mendenhall Valley sir.

Q. Other individuals or other personnel assigned to the Seventeenth, where would they typically live?

A. The large share of the people did live in the Mendenhall Valley, that was the primary housing area. There are other areas but—

Q. What are those other areas?

A. I can't remember the creek but five mile area had some housing in there—

Q. Was that Lemon Creek?

A. I believe so, yes sir. Of course there was Juneau proper and there was some housing there, there was some housing South of town but it's basic restricted to homes right on the road, the highway went out five or six miles and quit and there were houses along there they were routinely right along the edge of the road. The there were homes out near Auke Lake area which is further out the highway then of course the highway continued on for about twenty miles—

Q. Is that North or South?

A. North sir, and there were houses out there too, but like I say the major share of the people lived in the Mendenhall Valley.

Q. That was the major housing for all of Juneau wasn't it?

[28] A. Yes sir.

Q. And how many people as a whole resided in the Juneau community?

A. I counted 20,000 nominally. I think there were more during the winter time people would come in from places that they couldn't possibly exist during the winter time and live there and then go back out in the Summer.

Q. So about 20,000 total population?

A. Yes sir.

Q. And how many personnel were assigned to the district office?

A. Somewhere in the neighborhood of 200 or 250 people I would call it, I don't exactly.

Q. So in fact when you said it was a one in six ratio of Coast Guard to civilians it is actually closer to one in 1,000 isn't it?

A. I was calling it for the Valley area and I guess I could be wrong but the Valley area was the major housing area and I thought that coasties among there was one in six.

Q. But civilians live primarily in the Mendenhall Valley also.

A. Yes.

Q. So would you agree that one in 1,000 is closer to the accurate ratio given the district population and the Juneau population? 200 over 20,000.

A. I can't put it 200 over 20,000 because 20,000 people didn't live in the Valley but maybe I am off I don't know.

Q. When you lived in Juneau your family was with you.

A. Yes sir.

Q. Where is your family right now?

A. My family is in St. Petersburg, Florida.

Q. And why St. Petersburg, Florida?

A. My wife has a grandmother who is 98 years old yesterday and a father who is 75 neither are able to care for themselves. I transferred to Governors Island to facilitate moving my household goods to St. Petersburg as a stop-gap measure putting both those members in a nursing home.

Q. Your particular family situation hasn't effected your ability to require a humanitarian transfer or your need for a humanitarian transfer?



A. No sir. With the number of years I have in the Coast [29] Guard I would under no circumstances request any kind of humanitarian transfer.

Q. You stated on direct examination that you've been in and out the Coast Guard for 20 years with a three year nine month break. Are you proud to wear the uniform?

A. Absolutely.

Q. My guess is that you love the Coast Guard.

A. Yes sir, I have taken some bumps in my time and I have gone over some recently but I still do love the Coast Guard.

Q. You are aware in your 20 year career that there have been many offense committed by Coast Guard members aren't you?

A. I am not aware of -

Q. That offenses do happen.

A. I would say the ratio is about the same as in civilian life but I am not aware -

Q. But you are aware that offenses do occur and that court-martials do occur.

A. Yes sir.

Q. Have those offense effected your morale or your love of the Coast Guard?

A. They haven't effected my love for the Coast Guard I would say that there are times when what someone else has done has brought people to look at me in a different light when they would had they not done it.

Q. You stated that when you were in Juneau the paper publishes the name of an individual involved in an offense and their organization, the Coast Guard.

A. Yes sir.

Q. When you were in Juneau did you get any discounts because you were in the Coast Guard?

A. Yes sir, I did.

Q. Did you get credit more easily because you were in the Coast Guard?

A. I believe so.

Q. The fact that people's names being in the Coast Guard were published in the paper, did that effect your ability to get discounts?

A. I don't believe so, no sir.

A. Not that I know of, I couldn't - no not that I know of.  
[30] Q. You stated that you presently live on Governors Island in the BEQ?

A. Yes Barracks 513 sir.

Q. Prior to discussing this case with Mr. Couper and myself, had you heard anything about the allegations of child sexual abuse?

A. No sir, only that - like I said when I ran into Frank I asked him what he was doing here and he said it was an Article 32 hearing, I asked him what for and he got very teary eyed and I stopped.

Q. So until you had contact with people involved with this case you were aware of no effect on morale on Governors Island were you?

A. Impact from this case on morale on Governors Island?

Q. That's correct.

A. No sir, I was not aware of any allegations of any sort until then.

Q. Do you keep contact with anybody in Juneau?

A. Yes my wife does, we have friends that live there, I don't keep contact with them directly.

Q. Through contacts with your wife are you aware any effect on the reputation, morale, military discipline of the command in Juneau?

A. No nothing was mentioned that I know of.

Q. You owned your home in Juneau you said?

A. I bought it, yes sir.

Q. You received a housing allowance?

A. Yes sir.

Q. Are you aware that all Coast Guard personnel who were living on the economy were receiving a housing allowance?

A. I can't say that all do, I am under opinion that the only thing that they can't get is if Alaska is their home they can not get overseas pay, everything else is an allowance.

Q. But they do get allowance?

A. Yes sir.

Q. And that's normal?

A. Couldn't afford to live there any other way.



Q. As far as affording to live there you said that most wives had to work.

[31] A. I believe so, yes sir they had to at least go to work long enough to qualify for a loan. I can expound on that if you want.

Q. Not just yet. That's because the lender would look at the combined income to determine if you were qualified for the loan.

A. Exactly sir.

Q. You have been transferred many times you said.

A. More than most people.

Q. Have you lived on the economy in many of the places you have been transferred?

A. I have lived in government quarters only twice, I have lived in government lease quarters and that is among the people in the economy, yes most of the time.

Q. But when you had to go out and rent or purchase a home, have you done that more than once?

A. Yes more than once, yes sir, I can't say it was all the time.

Q. Each time you lived in quarters other than leased housing or government quarters you received a housing allowance didn't you?

A. You receive a housing allowance if you are not in government quarters.

Q. The amount of housing varies depending on the cost of living in each area doesn't it?

A. It does not with the variable housing allowance sir but over the years no it didn't necessarily.

Q. But now it does?

A. Now it does, yes.

Q. Did it in 1982 to your knowledge?

A. It did overseas sir, we were like I said HOLA/COLA area. In 1982 they had changed to the rent plus program, I think they are back at VHA now.

Q. They being the Seventeenth district?

A. They being the Coast Guard had gone to a rent plus program.

Q. You stated that because you in the Coast Guard your wife had no problems getting a job.

A. Yes sir.

[32] Q. Would she have had no problems getting a job whether or not she was qualified because you were in the Coast Guard?

A. I believe she would have had a bit more trouble because the major factor there is that people come into town and get a job and say they are going to be there for a long period of time and they keep the job long enough to get up enough money to go somewhere else. They have a portion of the society that just floats around and moves and when they have a Coast Guard wife they know they've got her there for three years.

Q. But your wife couldn't have gotten a job if she wasn't qualified for the job.

A. I am sure of that too, yes.

Q. You also stated that now that you have learned of these offenses you are a little more careful with your children as far as who you trust them with.

A. Yes I have spoken to the wife at length on it since the discussions with yourself and the Lieutenant Commander. We have talked to the girls both in an instructional manner as well as past history. I would say it is something you don't try you don't even think about until something like this happens and then yes you have to take a look at your life and how things are and how things were and so on.

Q. Would you take the same hard look at your life if an individual in St. Petersburg, Florida was charged with child abuse or child molestation?

A. I can only tell you what we have done and that is we have brought about more of an awareness with our children because of the explosion of cases that we have become aware of.

Q. From the media?

A. Well, that's where I hear about them the most, yes sir. There is an awareness now that there wasn't six months ago even.

Q. And that awareness is generated not just by Coast Guard offenders, but by all offenders, is that right?

TC: Your honor, I don't mind leading questions but quite a number of times defense counsel has been testifying with

virtually only a nod of the head required from the witness. I believe that goes too far in the way of leading questions.

MJ: The objection is overruled.

WITNESS: Would you ask the question again sir?

Q. That increased awareness, is it a result of all the offenses whether committed by Coast Guard personnel or civilian personnel?

[33] A. Yes sir, it is an awareness from that standpoint. In this particular case I queried my wife and talk to the children from the standpoint as far as the allegations are - my children did associate with the Petty Officer Johnson's children and we did ask them for that reason.

Q. Has this case effected the way you trust your other Coast Guard friends?

A. I would say that the best answer for that sir is that I would be more careful. Yes, I would - it doesn't change my trust of people I have really looked at hard, I would be more careful.

Q. How about if that person was a civilian versus an uncle or a cousin, would you still be just as careful?

A. Yes sir, I believe so because of this.

Q. Now that you have learned some of the facts and circumstances about this case, would that effect the way you use the sponsor program at all, would you continue to use the sponsor program?

A. Yes I would use the sponsor program still. In the case of my transfer to Juneau though, my sponsor was a Lieutenant Commander and his wife who were friends of the family and they did, while we were out house hunting, take care of the children. From that standpoint I would be more careful.

Q. The Lieutenant Commander was a friend of yours?

A. The Lieutenant Commander was a friend of the family, more so of my parents than of myself, but yes I was associated with him and did know him.

Q. So in any event whether a sponsor was a friend or relative or just an acquaintance, you would still be more careful with your daughters as far as their care.

A. I would treat - yes sir, I would treat Coast Guardsmen and people who I would - yes I would be more careful.

Q. Just one more question. As far as Juneau being a cohesive town, in all the times that you have been transferred to populous areas or small town area have you ever seen similar type of cohesiveness for instance in Puerto Rico?

A. Yes sir, it is a different type of cohesiveness in that it was a military community and we were basically sequestered onboard base to a large extent, but they were together. In Juneau the town was very cohesive, but it was the town itself with the military people mix in as a cohesive town. I was in Puerto Rico, shortly after I left Puerto Rico they had the case where quite a few military boys were blown away in a bus. There was some political unrest so there is a fair amount of difference between the two places.

[34] Q. I said one more question and I am going to ask you one more, lawyers are notorious for that. Any effect this may have on Juneau as a cohesive town would not be a long lasting, is that correct?

A. I believe that the effect would be substantial as far as negative impact on the Coast Guard and it would - the Coast Guard people would out live it. I would think that what would remain is the awareness and the education that you have to give children in order to keep this from happening again.

Q. And that would be the same as a civilian perpetrator, that awareness?

A. I would think so, maybe not in that town but yeah, I would think so.

DC: Thank you Chief.

MJ: Redirect?

## REDIRECT EXAMINATION

Questions by the prosecution:

Q. If a civilian engaged in child molestation with a Coast Guard dependent, would that have any effect on the Coast Guard's reputation?

A. No sir.

Q. If a civilian engaged in child molestation with a Coast Guard dependent, would that have any impact on what you said about being more scrutinized in the Coast Guard?

A. The Coast Guard wouldn't be scrutinized, no sir.



Q. What is it that is different between the hypothetical Mr. Hochberg has given you about a civilian perpetrator of child molestation against a Coast Guard dependent and a Coast Guard perpetrator of child molestation against a Coast Guard dependent? What makes that different in your mind?

A. What makes it different is the Coast Guardsmen is in a position of I guess public trust and they are expected to hold themselves—hold their level of honesty and integrity up above what would be expected of other people. Civil servant.

Q. Police?

A. Yes sir.

TC: Just for the record, can I have this marked as the Appellate Exhibit next in order and I would ask that Chief Truby indicate on that map if your place of residence was on that map if you could indicate with a pen and a large X.

[The trial counsel handed the map to the defense counsel for inspection.]

DC: Excuse me your honor I see no reason to have this marked as an Appellate Exhibit, it is marked as an Appellate Exhibit already.

TC: I prefer not to mark up the existing Appellate Exhibit.

MJ: If it is for me maybe he can show me on the one that is already marked so we don't have to build a huge record.

TC: That will be fine.

MJ: On the one that is already in, let's not mark this one.

Q. Chief Truby I will show you Appellate Exhibit VIII which contains a number of maps. If your home appears on that map could you so indicate to the judge and once again give the address of that home?

[The witness was provided Appellate Exhibit VIII.]

A. Yes sir it does. My home doesn't show on the map but I can show you the street that it is on. [Pointing at the map] This is McGinnis right here and I am one house up, right there.

MJ: You are gesturing to a point off of Birch Lane in the center square of the top row of squares on the map of the Mendenhall Valley.

WITNESS: Yes sir, and the address was 4407 McGinnis.

Q. Do you know where Chief Warrant Officer Johnson, then Yeoman First Class and Yeoman Chief, lived?

A. Yes sir.

Q. How far were you from where they lived in blocks?

A. Nominally a block and a half sir.

Q. In a two block radius from your house, how many active duty Coast Guard people lived in that area?

A. Eight that I can be absolutely sure of sir.

Q. Any Coast Guard retired in that two block area?

A. I can't think of any in the two block area sir.

TC: Thank you.

MJ: Recross?

### RECROSS-EXAMINATION

Questions by the defense:

Q. Chief Truby the effect on the Coast Guard you stated would be different if it were a civilian perpetrator, correct?

A. If it were a civilian perpetrator—

Q. Civilian perpetrator of a Coast Guard dependent, would there be no effect on the Coast Guard as far as reputation or morale?

A. Not for the Coast Guard's reputation, no sir.

Q. But there would be an effect on the Coast Guard wouldn't there in your opinion if there was a Coast Guard perpetrator and a civilian victim?

A. The perpetrator is the person who would be charged?

DC: Yes.

WITNESS: Yes sir, I believe there would be.

Q. As far as the eight people in the two block area, can you state their names?

A. I can certainly try sir. Master Chief Cruz, Petty Officer Johnson, Master Chief Hagg, Chief Massie, myself, Hutemacker Lieutenant or Lieutenant Commander, there is an SK or YN1 that lived the next house over and I can't remember his name sir I am sorry, Chief Dalioan and that is it sir.

DC: I get six.

WITNESS: I named seven sir, myself included.

DC: Thank you no further questions.

TC: No questions your honor.

The witness was duly warned and withdrew from the courtroom.



Chief Warrant Officer Lawarance DeMarchi, U.S. Coast Guard, was called as a witness for the prosecution, was sworn, and testified as follows:

### DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name, your rank, duty station and your service?

[37] A. Yes sir, full name is Lawarance Preston DeMarchi, rank is CWO2, unit is U.S. Coast Guard Training Center, Governors Island, position is Chief of Personnel Division.

Q. Mr. DeMarchi were you ever assigned in Juneau, Alaska?

A. Yes sir.

Q. During what period of time?

A. Twice sir, the first time from November 1972 to June 1974, the second time November 1977 to June 1980.

Q. Do you still keep in touch with people up in Juneau, Alaska?

A. Yes sir.

Q. As a result of your two tours in Juneau and keeping in touch with people in Juneau do you feel you are up to date on what is happening in the area?

A. To a degree, yes sir.

Q. Can you describe physically anything unique about Juneau that makes it different from any other town?

A. Yes sir, I describe Juneau as a close-knit closed-off community. I describe it that way because to enter Juneau you must either take a boat in or you must fly in, you can not drive in or drive out. The accessibility is limited. As far as the geographical physical lay out of the city, it is bordered on one side by a high mountain range, its bordered on the other side by a channel, on the other side of the channel its bordered by a island and at both ends of the city it is also closed off by mountains which creates a locked-in atmosphere.

Q. Is there anything unique about the population?

TC: I will withdraw that question.

Q. What kind of reputation has the Coast Guard enjoyed in Juneau?

A. From my experience of my tours in Alaska the Coast Guard in Alaska itself and especially in Juneau has a very high reputation, we are a very well thought of organization. We are well thought of for two particular reasons; number one because we are life savers and they consider us life savers in the true sense of the word and also they respect us because of our law enforcement image.

Q. If a Coast Guard active duty person engaged in child sexual abuse, the victim being a Coast Guard dependent daughter, do you have an opinion as to whether that would have any impact on the reputation of the Coast Guard in Juneau?

A. Yes sir I have an opinion.

[38] Q. On what factors of knowledge do you base that opinion?

A. I base that opinion on a number of factors; the news paper for an example, the news paper in Juneau is known as the South East Empire and the local news paper there in Juneau has what they call the police blotter, that is one segment of the news paper. The police blotter is use not only to transmit information from the news paper's point of view, but for the local population it is used sort of as - it may sound weird but it is a means of entertainment, people enjoy reading the police blotter to find out what is going on to find out the latest dirt. If a person was arrested it would make the police blotter, if a person was found to be in violation of a particular law in that area it would make the police blotter and that's my answer.

Q. And how would such a situation impact on the reputation of the Coast Guard in your opinion?

A. In my opinion again, if a member of the Coast Guard was arrested and their name appeared in the police blotter it would have an adverse impact because the police blotter would be sure to identify the member as being a member of the Coast Guard, it would not simply say "John Doe arrested for such and such violation", it would say "John Doe, U.S. Coast Guard, arrested" and it would not look favorable to us simply because we are thought of as law enforcement types.

Q. Other than a diminished reputation is there any other

specific way that the Coast Guard would be diminished in society?

A. There are possibilities, there are possible ways, I am not saying that it would –

DC: Objection again your honor, this can only be conjecture, the witness is stating that it is conjecture and he has no independent knowledge whether these ways would effect the reputation of the Coast Guard and should not be properly considered.

MJ: Response?

TC: I believe that is just what he is going to testify to, ways that it could effect the reputation of the Coast Guard.

MJ: You are looking for lay opinion?

TC: Yes, this is lay opinion and it also, I would anticipate, relates to a special character of that community and the specific ways that it may impact in the reputation of the Coast Guard.

MJ: Objection is overruled, you may answer the question.

[39] WITNESS: Yes sir, okay, getting back to the question, ways in which a bad image or bad incident could effect our reputation within the community. Because we are so well thought of in the community of Juneau, merchants, landlords and various business people in that city and in that area offer discounts to members of the Coast Guard. Some places offer like a ten to fifteen percent discount when you make a purchase of certain items. Landlords, and I can speak from personal example on this, not all landlords require deposits up front if you move into a residence. Hotel managers and so on do not require payment up front if you live in a hotel if they know you are in the Coast Guard. To a great degree I think those discounts are offered and those liberal payment terms are offered because of the fact that we are Coast Guard. I think that if our image or reputation was tarnished or damaged it could possibly effect the degrees to which they are willing to offer those discounts or liberal payment terms.

Q. Do Coast Guard people in Juneau have a base or commissary or exchange?

A. At Station Juneau which is located a couple of blocks from the district office there is station building and in that

station building there is a small exchange. There is no commissary, at least there was no commissary at the time I was station there. At the time I left there was also no commissary, there was a small exchange and there was more or less a liquor locker and place you could go and order merchandise out of the AFES catalog and so on.

Q. So the Coast Guard must rely on the community for those services rather than on a –

A. We rely on the community for our commissary privileges or needs, most of our exchange needs and definitely for housing.

Q. If there were reported an incident of a Coast Guard member sexually abusing a Coast Guard dependent, from your experience in the Coast Guard and your experience in Juneau, would that have any impact on the morale of the service in Juneau or in the Coast Guard in general if that word got out?

A. Would the incident itself have an effect on morale? No.

Q. How many children do you have?

A. I have one child.

Q. If the Coast Guard transferred – where do you live?

A. I am now residing on Governors Island.

Q. Are you aware of any child abuse cases on Governors Island in the past few years?

A. In the past few years? Yes sir, in the past few years, yes.

[40] Q. Do you know what impact that had on the morale on Governors Island?

A. I don't know how to describe it in terms of morale, but as far as concern by parents it had a great impact and it also had a great impact in the way that I let my daughter just walk around Governors Island. I go every where now with my daughter, every where, the swimming pool, the movies, every place.

Q. Is that a common practice on Governors Island to have parents go around with children all the time?

DC: Objection, there is no foundation for whether Mr. DeMarchi knows if it is a common practice or not.

MJ: Sustained.

Q. Do you know whether it is a common practice for parents to walk around with children?

A. Do I know if it is a common practice? Certain parents do and certain parents don't.

Q. If a person were assigned PCS to Governors Island who had engaged in child molestation at their previous unit what impact would that have on the attitudes and morale of parents and military members here and their families?

DC: Objection your honor.

MJ: Sustained.

TC: That is all I have your honor.

MJ: You may cross-examine.

### CROSS-EXAMINATION

Questions by the defense:

Q. Mr. DeMarchi when you were assigned to Juneau you didn't know Petty Officer Solorio while you were in Juneau did you?

A. No sir, I did not.

Q. You correspond regularly with people in Juneau?

A. Yes sir, I do.

Q. Are you aware of any impact that these allegations made against Petty Officer Solorio have had on the Juneau community?

A. No sir, I am not.

[41] Q. If a Coast Guard member in Juneau was arrested for any crime, that would go on the police blotter?

A. To my understanding and to my knowledge, yes sir. If I may I can relay a personal incident.

DC: Please do.

WITNESS: My brother-in-law was arrested in Juneau. My brother-in-law and his family and I and my family were both stationed in Juneau at the same time, I at district and he on the Coast Guard Cutter Planetree. Without mentioning his name he was arrested in 1980 for drunken driving. He had come out of the Coast Guard EM club there in Juneau and he was caught weaving down Eagan Highway. He was arrested and put in jail for three days and that made the police blotter and it was a rather embarrassing situation.

Q. If your brother-in-law or some other Coast Guard member had been arrested for murder, that would also make the police blotter?

A. That would definitely make the police blotter, yes sir.

Q. So from the most minor to the most serious offenses, the Coast Guard member's name and organization would be put in the police blotter.

A. From my experience, yes sir.

Q. If a Coast Guard member was arrested and charged with murder and of a civilian, would that effect the reputation, morale, integrity, etc. of the Coast Guard in your opinion?

A. It would effect the integrity, it would effect the reputation. The question keeps coming up "would it effect the morale", I don't know if it would effect the morale but it would definitely effect reputation and integrity.

Q. Would the reputation of the Coast Guard be enhanced if the Coast Guard turned the individual who was charged over to the Alaskan state authorities?

A. I think it would sir, yes.

Q. As long as the individual was punished in some form, then the Coast Guard reputation would not be effected very much at all would it?

A. As I answer your question can I relate back to some of the things you and I discussed earlier or am I not permitted to do that?

DC: Sure.

WITNESS: Okay -

[42] MJ: Excuse me, what you may do here is explain an answer, what I don't want to do is drag up all the old conversations that you may have had in preparation for your testimony here today.

WITNESS: Yes sir. Sir as you and I discussed in the last couple of days the people in Juneau are very - they don't like cases or issues to drag on, they like quick action. If there is a crime committed they expect quick justice. From my observation people are willing to take the law into their own hands if they don't feel that the judicial system is being served quickly enough. I would think that if a person was arrested, whether



that person is a civilian or military, and that case was quickly handled, that people in Juneau would be very impressed. If a person was in the Coast Guard and the Coast Guard was extremely cooperative with the Juneau civilian authorities I would think that the people in Juneau would be very very impressed.

Q. And the Coast Guard reputation would be enhanced.

A. Enhanced? Yes sir.

Q. Mr. Couper asked you about some of the sex abuse cases that occurred a number of years ago here on Governors Island. You stated that there was some concern among the parents. Is that the same type of concern that is engendered when you read about cases of sex abuse in the paper and on TV in Brooklyn, Minnesota, or California or where ever?

A. Yes sir.

DC: Thank you, no further questions.

MJ: Redirect?

TC: No your honor.

The witness was duly warned and withdrew from the courtroom.

Chief Warrant Officer Larry Johnson, U.S. Coast Guard, was called as a witness for the prosecution, was sworn, and testified as follows:

### DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name, your rank your present duty station and your service.

A. My name is Larry V. Johnson, United States Coast Guard Headquarters in Washington DC, I am a Chief Warrant Officer in the U.S. Coast Guard.

[43] Q. Mr. Johnson when did - have you ever been assigned to Seventeenth District?

A. Yes.

Q. When were you assigned to the Seventeenth District?

A. I reported there I believe in August or September of '78.

Q. And when did you depart?

A. I left there in June of '82 - '83 excuse me.

Q. Do you have a family?

A. Yes I do.

Q. Who is in that family?

A. My wife and two daughters.

Q. And their names?

A. My wife's name is Jo Ann, my oldest daughter is Amber and my youngest daughter is Carrie.

Q. Did they accompany you to Alaska?

A. Yes they did.

Q. Where did you live in Alaska?

A. I lived at 8920 Birch Lane in the Mendenhall Valley.

Q. I believe the judge has Appellate Exhibit VIII which contains a number of maps. I wonder if you might indicate to the judge the area where you lived.

[The military judge handed the witness Appellate Exhibit VIII. The witness looked at the map of the Mendenhall Valley attached to Appellate Exhibit VIII.]

MJ: The witness has indicated a position on the top row of blocks on the page in the center block to the right in the middle portion of that block approximately on fourth of the way from the bottom of the block up, drawing a circle generally around where it said Birch. Is that correct?

WITNESS: Yes sir.

Q. What type of housing did you have?

A. It was a single family dwelling, three bedroom with an attached garage.

Q. Did you rent or purchase?

A. I purchased my home.

Q. Was there any Coast Guard housing in the area?

A. No sir, there was not.

[44] Q. Were there other Coast Guard people around you?

A. Yes there was.

Q. If you can define a convenient area of reference, can you state how many Coast Guard people were in that convenient area of reference?

A. In the immediate area there was -

Q. What is that area of reference?

A. Within I'll call a city block, there was, counting myself, one two three four five six seven families that I can think of off the top of my head.

Q. Coast Guard active duty?

A. Yes.

Q. Did most of those families have children?

A. I believe all of them did.

Q. What was Amber's age when you arrived? - Never mind I believe we already have that.

Q. Who lived next door to you?

A. Richard Solorio lived on the left hand side of me facing the street.

Q. Where did Richard Solorio work?

A. Seventeenth Coast Guard District Office in the Federal Building in Juneau, Alaska.

Q. Is he here in court?

A. Yes he is.

Q. Would you point to him?

TC: Let the record indicate that he pointed to the defendant.

Q. Who lived in the Solorio house?

A. Richard Solorio, his wife, his two boys and at one time I believe it was a niece staying with them for some time.

Q. How did you come to know Petty Officer Solorio?

A. I believe we first met when he came home from work one day or just got acquainted to the house, I went over and introduced myself and then we came to know each other a little bit closer at work, saw each other more frequently.

Q. When you met him out in front of the house did you know that he was in the Coast Guard?

[45] A. Yes I believe I did because he had a Coast Guard sticker on his car.

Q. Did you - how did you come to know him at the office, through what types of activities?

A. Passing in the hall, I believe we had some mutual friends and some of it was job related, I had worked in two different offices when he working in one office and my job required me to take care of some business in his office.

Q. What was your rating at that time?

A. I reported there as a YN1 and I departed there as a YNC.

Q. Petty Officer Solorio's during that same period of time?

A. He was a YN1 the entire time.

Q. Did most of the yeoman at the, if you know, at the Seventeenth Coast Guard District Office building know each other?

DC: Objection, the witness can't testify as to what other yeoman knew.

MJ: Sustained.

Q. How did you get to work?

A. I normally drove.

Q. During the period of time when you were in Juneau did you always drive alone?

A. Not always, no.

Q. Who did you drive with?

A. I was in several different car pools or I rode with somebody who drove all the time and at one time I rode with Richard Solorio, we alternated driving.

Q. About what period of time did you do that, do you know?

A. I would say the most of the last year to 18 months.

Q. Was there a purpose other than transportation and economy for your car pooling with Petty Officer Solorio?

A. Convenience plus both of our wives had businesses in the house and that assured that one of the vehicles would be home in case they needed it.

DC: Your honor, I am going to object to the portion of the testimony as being irrelevant. Whether the wives had business in the house, whether they needed a car is not relevant to the service connection issue.

MJ: You are objecting to the answer not the question?

[46] DC: I am moving to strike that answer, yes sir.

TC: Your honor, the government would suppose it has some relevancy but what ever it is worth your honor can weigh that.

MJ: I am going to overrule the objection and state to both counsel that I recognize its remotely limited relevance.

Q. While you were commuting with Petty Officer Solorio did you or did you not wear the uniform when you were commuting back and forth?

A. I wore my uniform.

Q. How about Petty Officer Solorio?

A. I believe he did most of the time.

Q. Among the Yeoman in the Seventeenth Coast Guard District was there a common practice when ever you wanted to find information rate related that you couldn't put your hands on right in the book -

WITNESS: I am sorry, repeat the question.

Q. As a rated Yeoman is it a common practice to consult with other Yeoman when you can't find an answer right away?

A. Yes it is.

Q. Was there such an informal network at the Seventeenth District Office building?

A. They had some training going on in the building, it was announced but I didn't always get the word but I believe I attended one or two of the meetings.

Q. Who was directed to attend these type of training sessions?

A. I believe it was open to Storekeepers and Yeoman.

Q. Have you had an occasion to call on Petty Officer Solorio for advice while you have been a Yeoman or Warrant Officer?

A. I don't recall.

Q. Has he had an occasion to call on you for advice?

A. I was his personnel Yeoman at one time, he may have come down and asked me some questions.

Q. As a result of - did you ever let Amber play with people, over at someone's house that you did not know the family?

A. No not usually.

Q. Did she ever go over to play at the Solorio's?

[47] A. Yes she did.

Q. How often would she go over there to play while you were in Alaska?

A. I would say at least three to four times a week.

Q. Do you know if Petty Officer Solorio was home during any of these periods?

A. I am sure he was home sometimes.

DC: Objection, this has nothing to do with the jurisdictional motion, it may be relevant on the merits but it is certainly not relevant here.

MJ: Where are you going?

TC: It is just background your honor.

MJ: I'll overrule the objection.

TC: I recognize the objection to that particular question.

Q. When did your daughter reveal incidents that occurred in Alaska that are the subject of these hearings?

A. It was March of this year.

Q. Who did she divulge that to, do you know?

A. It was a school counselor.

Q. What actions did you take as a result of her information she gave to her counselor?

A. I went and sought aid from Family Services at Coast Guard Headquarters. The school counselor had recommended that we get into some sort of counseling, so I sought a reference from the Family Advocacy Program and they in turn directed us to a family counseling practice there were we live.

Q. Who specifically did you talk to in the Family Advocacy Program?

A. He name escapes me right now.

Q. Was it Brenda Watson?

A. Yes it was.

Q. Do you know basically what her training is?

A. I believe she has been a social worker with the State of Virginia at one time.

Q. Do you know about how many social workers the Coast Guard has there in the Family Advocacy Program?

[48] DC: Objection.

Q. Do you know?

A. Yes, I do know.

MJ: Overruled.

Q. How many do they have, social workers?

A. Two that I am aware of.

Q. Did you seek this counseling?

A. Yes we did.

Q. How many people are involved in this counseling?

A. Actually involved there are three right now, but my youngest daughter did see her on two occasions.

DC: Can we have clarification your honor, is Mr. Couper speaking about Brenda Watson or the Virginia counselor?



MJ: Maybe it can be cleared up.

Q. Where is this counseling being held?

A. It is being held with the State of Virginia Family Counseling.

Q. Is that a civilian or a military organization?

A. That is a civilian organization.

Q. Is this involve any cost to you?

A. It was initially, we have since filed CHAMPUS papers and the outcome of that has not been resolved.

Q. How often does your family go through this counseling?

A. Right now it is on a weekly basis.

Q. Has it been so since the initial report that Amber made?

A. Yes, as it has allowed.

Q. How has Amber's report of what happened with Petty Officer Solorio, how has Amber's report affected you in your job?

A. It has caused me stress in completing my responsibilities I feel that I am hindered in the time that I have to be away from my desk to do some of the preliminary things I have had to do with you and with the counseling. I feel that sometimes I am a little bit leery of taking on added responsibilities. I am always preoccupied with this.

Q. Have you been told whether continued counseling is advisable or necessary?

[49] A. At this time she feels there is no reason to terminate it, she recommends that we continue the counseling.

Q. If you were to be assigned to a place, a duty station where this type of counseling were not available, what would your reaction be?

A. If someone made me go somewhere else I would reconsider taking my family with me or not. I may not take them with me because the counseling would not be available and I would have to question about myself, too.

Q. Has this counseling been beneficial?

A. Yes it has.

Q. Do you believe it is necessary given your family circumstances right now?

A. Yes I do.

Q. Are there any other ways that Amber's report has affected you personally, not officially but personally?

A. Yes.

Q. In what ways?

A. I am very protective over her in the activities she participates in. I have to know where she is, what she is doing and who she is with. At times I may be over protective but that is just the way it is now.

Q. Have you spoken with some of your co-workers about what Amber's report or about what you are going through?

A. Yes I have.

Q. What have you told them?

A. I told them what she had told us and what we are going through at this time and why I am going to New York.

Q. Could you work with Petty Officer Solorio again?

A. I don't think so.

Q. How would you characterize your relationship with Petty Officer Solorio back in Alaska, not official relationship?

A. We were neighbors, we shared and borrowed things from each other as neighbors do. I think we both enjoyed watching our kids play together.

Q. Did you eat dinner at each others house or cook out?

A. I shared my grill with him now and then, but we didn't really have dinners with each other. There were occasions when we got together for parties.

[50] Q. Was he the type of person you might rely on if you needed a favor, if you went on TAD or you and your wife had to leave for some reason?

A. Certainly.

Q. Do you tend to trust Coast Guard people when you need a favor or something like that, to watch your kids or take care of something around the house?

A. Yes.

Q. Has Amber's report changed your trust in Coast Guard people?

A. To some extent.

Q. Has Petty Officer Solorio called you either officially or personally over the last few months?

DC: Objection, calls made at this point to one to four years

after any alleged incidents have taken place are not relevant to the service connection issue.

TC: Your honor, this one case I am thinking of in particular –

MJ: Where are you going, what is your theory?

TC: An Air Force case where part of the service connection that was established was the harassing calls and the effect on the member.

MJ: We don't have any charges of harassment through telephone calls.

TC: No your honor.

MJ: So what is your theory, where are you going, articulate your theory supporting the question.

TC: There was a telephone call soon after Amber's report –

MJ: You are giving me an offer of proof, I want a theory.

TC: I am referring to the Air Force case where the participant, I believe it was homosexual crimes, was making harassing phone calls to the other participant and that was part of the grounding of the service connection, the time away from the job, the mental anguish of the harassing phone calls.

DC: Your honor, those harassing phone calls, I believe, were part and parcel to the offense and that was at that point relevant to the service connection issue. These phone calls have [51] occurred long after any offenses took place if any offenses did take place and certainly not involved with the offenses. If they want to be charged as separate offense, which I don't believe they can be, that may be a different story.

MJ: Once again trial counsel, how, if at all, are any phone calls which may have taken place relevant on the motion before the court?

TC: That harassing phone calls affect the members productivity, his family particularly if the phone calls are immediately after a report of abuse. It also shows by one concrete example the impact of the basic offense on the family and on the member by his reaction to the phone call.

MJ: I'll overrule the objection and allow the witness to answer and make the same comment I made previously that I

recognize the far tangents of relevancy that we are dealing with right here. There are some there, not a lot, I haven't heard the answer yet but from what I can see from the question.

Q. Did you receive any phone calls from Petty Officer Solorio?

A. Yes I did.

Q. When and where did you receive these calls?

A. He called me at work once, I believe it was in late February, asking me a business question relevant to my job and his job. Then it was later on in, I believe it was March, he called the house and it was right after Amber had brought this all out.

Q. Was there anything unusual about that call? Had he ever called you before?

A. No I didn't really see any reason for him to call me and his initial comments were that he got a new phone line or subscribed to a new phone service so it was cheaper to call.

Q. Was there anything else that he mentioned?

A. He thanked me for expediting the reply to him that he initially requested at work.

Q. What impact did this phone call have on you and what action did you take if any?

A. I was reluctant to say anything at all, in fact the latter part of the phone call I didn't say anything.

Q. Why was that?

A. I couldn't understand why he was calling and knowing what I knew at the time I had nothing to say to him.

[52] Q. Did you take any other action as a result of this phone call?

A. I told you.

Q. Did you take any other action with respect to your family?

A. I told my daughter not to answer the phone, that Carrie would have answer the phone to screen her calls if we were not home.

Q. Why was that?

A. Because it upset Amber tremendously.

Q. I believe Mr. Hochbert has asked you a question about whether your reactions to Amber would be any different if it

were a civilian perpetrator rather than Petty Officer Solorio who is accused. Would this have a different effect on you if it was a civilian accused to of doing these things to Amber?

A. I would feel the same no matter who did it, but the fact that it was someone I knew closely and was a Coast Guard member, a friend in the Coast Guard, that made it worse.

Q. Can you articulate in what ways it makes it worse to you personally?

A. It is like someone you trusted and knew very well turned around and stabbed you in the back.

Q. Does the family counseling that you are undergoing right now, do you believe that is necessary for your future mental health and your family's?

A. Yes I do.

Q. Have you been told about how long this counseling will extend?

A. It could take as much as a year or more.

Q. Besides being next door neighbors what other contacts do you know Amber had with Petty Officer Solorio?

A. She participated on a city youth soccer team which Richard Solorio coached. She participated on a city youth bowling team which Richard Solorio was participating in. Trick or treat type things, we would go out together on that.

Q. Were these youth teams Coast Guard sponsored or Coast Guard related in anyway?

A. They were city, they were sponsored by the city but there were Coast Guard and civilian people mixed in the teams.

Q. How did Amber get home from these events?

A. If we didn't bring her home she would normally come home with Richard Solorio.

[53] Q. Would you let your daughter ride home with someone you did not know?

A. Not normally.

Q. What is the Coast Guard's reputation in Juneau while you were there?

DC: Objection your honor, this getting to be cumulative, it has been asked -

TC: I will withdraw that. That is all I have your honor.

DC: Your honor, the defense would ask for a ten minute recess.

MJ: Probably a good idea for all of us. We will reconven in ten minutes, court will be in recess.

The Article 39(a) Session recessed at 1425 hours, 3 June 1985.

The Article 39(a) Session was called to order at 1435 hours, 3 June 1985

MJ: The Article 39(a) Session will come to order.

TC: Your honor, all parties who were present when the Article 39(a) Session recessed are again present, no persons required to be present are absent, Mr. Johnson is on the stand.

MJ: Defense counsel may cross-examine.

### CROSS-EXAMINATION

Questions by the defense:

Q. You stated on direct examination that you friends, that you trusted Petty Officer Solorio?

A. Yes I did.

Q. The relationship you had with Petty Officer Solorio was based primarily on the fact that you were neighbors was it?

A. That was part of it, yes.

Q. Would you have car pooled to work with him at any time if you wouldn't have been next door neighbors?

A. If the car pool worked out with him it wouldn't have made any difference neighbor or not.

[54] Q. That car pool would have been based on geographic relationships and not necessarily friendship relationships?

A. It was based on we were both in the Coast Guard working in the same building.

Q. Geographic relationships.

A. Yes.

Q. When you car pooled, what time would you leave in the morning?

A. I believe we left a little after seven o'clock in the morning.

Q. And when would you return?

A. Work was over normally at four fifteen.



Q. So you would leave at four fifteen?

A. Yes.

Q. That car pool stopped primarily because Petty Officer Solorio started working late didn't it?

A. That is correct.

Q. So you stopped car pooling based on his schedule?

A. Yes.

Q. Your relationship between your family and the Solorio's developed also because your daughter was good friends with Brian Solorio, Petty Officer Solorio's son.

A. She first met Brian that is correct.

Q. She met Brian before you met Petty Officer Solorio?

A. I believe so.

Q. When she when over to the house it was primarily to see and play with Brian.

A. That is correct.

Q. That relationship between the families would not have been the same if you had children of different ages would it?

A. I don't know.

Q. The relationship developed when your daughter began bowling on the same league that Petty Officer Solorio participated in, as that relationship developed a family relationship developed, is that true?

A. I don't understand your question.

Q. As your daughter became involved in bowling, the same bowling league that Petty officer Solorio assisted in, your family relationship continued to develop?

[55] A. We were still friends, yes.

Q. That helped the friendship because the children were engaged in the same activities.

A. Not necessarily.

Q. Amber and Brian went to school together didn't they?

A. Yes.

Q. And that also helped build up that relationship.

A. It was already established.

Q. But it continued didn't it?

A. It continued.

Q. If Amber hadn't been friends with the children there would have been less contact between the two families.

A. More than likely.

Q. The relationship continued as a result of the soccer team that Amber played on.

A. Yes.

Q. Can you give me an estimate, two five seven, the different duty stations you have been assigned to in your career?

A. I believe I am on my eighth assignment.

Q. Eighth different geographical area?

A. No, I had two assignments in Southern California, I was stationed at Oklahoma City twice.

Q. And each time you moved, did you make new friends?

A. Yes.

Q. Are some of those friends civilian?

A. Yes.

Q. Does your daughter, both Amber and Carrie, become friends with civilians children as well as military dependent children?

A. Yes.

Q. And it is typical for your children to get to know and play with next door neighbor especially if they have children the same age?

A. If there are children around, yes.

Q. So when you socialize with Petty Officer Solorio and his family it was primarily with regard to civilian off base activities wasn't it?

A. Neighbor functions, yes.

[56] Q. At the Coast Guard District office in Juneau, you and Petty Officer Solorio never worked in the same office did you?

A. No we did not.

Q. There was a time when you were not even on the same floor as Petty Officer Solorio.

A. That is correct.

Q. And your contact with Petty Officer Solorio at work was fairly limited.

A. For the most part, yes.

Q. How long have you been in the Coast Guard?

A. 16 years.

Q. Do you have any strong feelings about the Coast Guard?

A. Yes I do.

Q. Positive feelings or negative?

A. Positive.

Q. Are those feelings about the Coast Guard Changed as a result of these incidents?

A. To some extent they have, in a small way they have.

Q. Do you think that the Coast Guard is not as good a place to work, organization to be involved with because of these incidents?

A. As an organization I haven't loss any feelings about the organization.

Q. You stated on direct examination that you are cautious now with whom your daughters go to visit and who they associate with.

A. Yes.

Q. Is that the case with all male adults not only Coast Guard male, is that true?

A. Yes it is.

Q. You also stated that you wouldn't let Amber play at people's houses if you didn't know their family first.

A. That is correct.

Q. But whether they are civilian or military, once you got to know them it would be fine if she played with them with the requisite degree of caution.

A. Right.

Q. You stated that this incident has had a profound effect on your family, but the effect would be the same would it if it were a civilian offender?

[57] A. Probably so.

Q. And the stress that you felt on your job would be the same if it were a civilian offender.

A. At least as bad.

Q. Especially if it were a civilian who you knew and trusted.

A. If it were somebody I knew an trusted it would be that more added effect on me.

Q. And Amber would need just the same counseling as if it were a civilian offender.

A. I suppose so.

Q. You stated on direct examination that you couldn't work with Petty Officer Solorio any more. Would you want to work with anyone who had been accused of a very serious crime?

A. It would depend on the crime.

Q. Say murder.

A. No.

Q. How about rape?

A. No.

Q. You stated on direct examination that you tend to trust Coast Guard people.

A. Yes.

Q. You trust Coast Guard people whether you know them or not?

A. Generally.

Q. Would you let Amber play at a Coast Guard family's house whether you knew that family or not?

A. Unsupervised?

Q. Unsupervised?

A. Probably not normally.

Q. You talked about two phone calls you received from Petty Officer Solorio, one was at work and that was business related.

A. Yes it was.

Q. And one was at home. Did Amber receive that phone call?

A. I am not sure who picked up the phone. I take that back, I believe it was my youngest daughter, Carrie.

Q. Amber never even spoke to Petty Officer Solorio.

A. Not at home.

[58] Q. Nothing was discussed about these incidents or any other incidents.

A. Not over the phone.

Q. The phone wouldn't seem unusual at all if you hadn't known about these incidents.

A. The fact that he said he called me because he subscribed to a new phone service to me didn't seem right.

Q. Would it have been unusual at all if there hadn't been these charges?

A. I still would have thought it was somewhat unusual. I don't call everybody because I got a new phone.

Q. Did you ever call Petty Officer Solorio from Oklahoma?

A. I believe I called him in New York after he arrived here to see how his trip went across country.

Q. Did you ever correspond with the Solorio's either by letters written by you or your wife?

A. My wife might have, I haven't.

DC: Thank you I have no further questions.

MJ: Redirect?

#### REDIRECT EXAMINATION

Questions by prosecution:

Q. How many floors were there in the office building of the Seventeenth District devoted to the Coast Guard operations?

A. Devoted to the Coast Guard? Nine, eight, seven. I believe there were four floors and a few odd offices on other floors.

Q. You have stated that you were friends with Petty Officer Solorio and you trusted him while you were in Alaska. Is it possible to divide up the various inputs to your trust between Coast Guard and non-Coast Guard neighbor and car pool—is it possible to divide it up and say how much was attributable to each way you knew Petty Officer Solorio?

DC: Objection, Your Honor, I believe he testified to that. He stated that he had very little social contact or very little contact with Petty Officer Solorio at work and the majority of his relationship was as a result of the neighborly relationship soccer, bowling, et cetera.

[59] MJ: I have heard the testimony. I will over rule the objection.

Q. Is it possible to divide it up?

A. I would say off hand no.

TC: Thank you.

MJ: No sir.

TC: Your Honor, there is one more question that I neglected on direct.

MJ: Go ahead.

Questions by the prosecution:

Q. Did you notice any change in Amber's personality while you were in Juneau, Alaska while Amber was going to school?

DC: Objection. This goes to the merits it does not go to the service connection issue.

TC: The dependents are quote, camp followers under *Relford* and if this had—if Amber's personality change, if she had any—had any impact on the family that is an impact of the offense.

DC: Your Honor, camp followers historically do not include dependents but was a term used for the merchants and women who followed along in the camp during the times of war.

MJ: I am familiar with Justice Douglas' phrases. I will over rule the objection. You may answer the question if you can.

A. I have to answer in the respect hind sight. All right, I did definitely see a change in Amber's attitude, her activities in school and her grades. They all declined rapidly.

Q. Did she under go any counseling while you were in Alaska?

A. No.

Q. Even in retrospect you can't say positively what the cause was, can you.

A. I have no way to prove it, no.

TC: That is all I have.

#### [60] RECROSS EXAMINATION

Questions by the defense:

Q. If you say that this is looking at this in hind sight then you really didn't notice these effects at the time did you?

A. They were noticeable but we were not aware of what may of caused them.

DC: No further questions.

The witness was duly warned and withdrew from the courtroom.

TC: Your Honor, at this point I would normally read the expected testimony of Amber Johnson in this bench matter. I would just refer Your Honor to that testimony and ask you to review it briefly and I will call the next witness.

The 39(a) Session recessed at 1455 hours, 3 June 1985.



The 39(a) Session was called to order at 1500 hours, 3 June 1985.

MJ: This Article 39(a) Session will come to order.

TC: Your honor, all parties who were present when the Article 39(a) Session last recessed are again present, no parties required to be present is absent. The government would call YN2 Frank Grantz.

Yeoman Second Class Frank Grantz, U.S. Coast Guard was called as a witness for the prosecution, was sworn, and testified as follows:

#### DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name, your rank and rating, your present duty station and your service.

A. My name is Frank Grantz. I am a YN2 in the United States Coast Guard. I am currently stationed at Group Baltimore.

Q. Petty Officer Grantz, have you ever been assigned to the Seventeenth District?

A. Yes sir. I was assigned to Seventeenth District from July 10, 1980 to June 29, 1984.

[61] Q. Was that an accompanied tour or unaccompanied?

A. It was an accompanied tour.

Q. Who accompanied you on that tour?

A. My wife and my 13 year old daughter, Jennifer.

Q. Your wife's name?

A. Kathy.

Q. How old was Jennifer at the time approximately?

A. She was about 10.

Q. Where did you live in Juneau?

A. We purchased a mobile home in Glacier View trailer park. The address was 3555 Mendenhall Road, Space 84.

Q. The Judge has Appellate Exhibit VIII which contains a number of maps. One of them is of the Mendenhall area. If the location of your trailer is on one of those maps would you please indicate it to the Judge.

[Appellate Exhibit VIII was provided to the witness by the Military Judge.]

A. It was approximately right here, right across from Spruce Wood.

MJ: You have described an area within the block on the map as it is laid out in grids on the Mendenhall Valley map, Appellate Exhibit VIII. Second from the top row the second full block from the right hand edge of blocks near the left hand edge approximately a third of the way up in that area.

WITNESS: Yes sir.

Q. Did you know YN1 Richard Solorio while you were in the Seventeenth District?

A. Yes sir. I met YN1 Solorio shortly after I got there. We played basketball on the Seventeenth District team for a year. He helped my wife and I who ran the kids bowling league with that organization as treasurer of our bowling league.

Q. About how far did you live from Petty Officer Solorio?

A. About a mile or a mile and a half at the very most.

Q. How did Petty Officer Solorio happen to get involved in the bowling league?

A. He substituted and bowled on a league in town and I bowled on one of the leagues in town and I knew that he was a fairly good bowler. We had talked about it and when I took over the management of the league I asked him if he would like to help me coach and be the treasurer of the league so we would help the kids in town.

[62] Q. Did you ask him because you knew him in the Coast Guard or in part because you knew him in the Coast Guard?

A. Yes Sir. It was part Coast Guard and partly that I knew that he was a fairly good bowler and could probably help some of the kids that were in the league.

Q. How many people did you recruit to assist in this way?

A. It was myself and my wife, Petty Officer Solorio and two civilians.

Q. Did your daughter take part in any activities in which Petty Officer Solorio was involved?

A. My daughter was on the bowling league with us. She also played soccer for the Juneau Parks and Recreation League and YN1 Solorio was her coach for two years.

Q. Did you ever assist in coaching soccer?

A. A couple time when YN1 Solorio was working late or something. He would ask me if I would go and coach the team for him. He would give me a list of the players and what positions they played and asked me if I would -

Q. Where would he ask you this?

A. I would at work and we would do it on our lunch and then after work I would go home and change my clothes and then I would go over the soccer field that they were playing at and get ready for the game.

Q. Do you know why he asked you?

A. I assumed because I was his friend and we had done a lot of stuff together.

Q. And your daughter was on the soccer team?

A. And Jenny played for him. So, I always went when Jenny had a game and I didn't have a conflicting schedule I was always there. So, that's the reason I assume that he asked me if I would take over the team for him.

Q. Did Jenny ever go over and play at the Solorio house?

A. Yes she did.

Q. About how often?

A. Couple or three times a week for a while. Then she quit going over there.

Q. Can you put a approximate date when she stopped going over?

A. It was - let's see, we got up there in July of '80. The end of '81 the beginning of '82.

[63] Q. Did Jennifer ever see Petty Officer Solorio at work to your knowledge?

A. Yes sir she did.

Q. In what context?

A. The first year that we were up there my daughter went to Capitol School and after she would get done at school she would come down to the Federal Building and wait with me until after I got off work and then we would go home. In the course of her coming to my office she would stop and see YN1 Solorio and a couple of other people that she knew and say hi to them and then she would come up and wait until I got off work and then go home with my wife and I.

Q. Did you notice any change at all in Jenny's personality while she was up there in retrospect?

A. Jenny became very - she used to be outgoing and friendly and that changed. She didn't want to go anywhere and didn't want to do anything and she didn't want to be with anybody except herself. I didn't understand why because she had always been friendly and outgoing but that changed. She became very introverted, very quiet.

Q. Did she continue these sports activities?

A. Yes sir. That is about the only thing that she did, was play soccer and ball and other than that she didn't go anywhere or do anything with - she just wanted to be by herself.

Q. Did you take any action as a result of that to try to do something about it?

A. We asked her, my wife and I tried to talk to her and find out what was bothering her. She wouldn't tell us. After a time we got concerned and we took her to see a psychologist to see if Jenny would tell Doctor Greenold what the problem was and see if we could help her that way.

Q. When did Jennifer reveal to you what happened in Alaska with YN1 Solorio?

A. About two months ago we were called in for an interview by Special Agent Ferguson. I was contacted at work and he asked me to have my wife and daughter in his office at 1 o'clock the same day. It was at that time that I found out what was going on or what had happened while we were in Alaska.

Q. When did your daughter first tell you?

A. She didn't first tell me exactly what happened until we came up here for the Article 32 hearing in the beginning of April, I believe it was or the beginning of May.

Q. Can you describe your daughters reaction during that period of time between the interview with Special Agent Ferguson and the Article 32?

[64] She was very upset and very disturbing. She wouldn't talk to my wife or I and she just didn't want anything to do with anybody. She retreated into herself more than I had previously seen her do.



Q. Was there anyone else in the interview that Special Agent Ferguson conducted?

A. There was a Social Worker named Brenda Watson.

Q. Do you know where she is employed?

A. I believe she is employed at Headquarters.

Q. Can you describe the impact that your daughter's revelations have had on you?

A. Total shock, disbelief. I still have a hard time accepting what she told me. I didn't have any idea that Rich was this type of person. I considered Rich a very close friend and trusted him completely.

Q. Has this effected your performance of duty in any way?

A. Yes sir. I find myself having a very hard time concentrating on what I am doing. I am trying to sort through all the feelings that I have about what is happening to my daughter. She is most important in my life and it is becoming hard for me to deal with my job. Luckily for me the people I work for are very understanding. They realize that right now is a very difficult period for me. The job that I do is to the best of my ability and they realize that all this is happening at the same time and they realize that the work that I do is good work but it is not as good as I would like it because I can't devote all my concentration to it because I am trying to deal with my daughter.

Q. Is your daughter is undergoing counseling right now?

A. Yes she is. She is seeing a lady named Jeanette Rafferty once a week down at the Sex Crisis Abuse Center in Annapolis, Maryland.

Q. Are you or your wife undergoing counseling?

A. Yes sir we are. We have been set up with an appointment with Mrs. Rafferty's Supervisor at the same clinic every week.

Q. Are you paying for this out of your pocket?

A. No. The county is funding this. It is a - Anne Arundel County has a program that covers sex abuse treatment and it doesn't cost us anything.

Q. Have you spent any money in connection with counseling or examinations?

A. I have put out approximately \$300 for medical tests that were recommended by Jenny's counselor. I have submitted to [65] CHAMPUS but as of yet I have received no money back so everything I put out has come out of my own pocket so far.

Q. Do you think that this counseling is necessary for Jenny?

A. Yes I do.

Q. Do you think it is necessary for yourself?

A. Yes I do because I have a lot of feelings that I have to learn to deal with and I need to talk to somebody that is a professional. I can't do it by myself. I need to talk to a professional to get it straightened out.

Q. If the Coast Guard assigned you someplace where this kind of help would not be available what would your reaction be?

A. I would try everything that is within by legal rights to not go to wherever they were headed to transfer me.

Q. The counseling is very important to you right now?

A. Yes it is.

Q. Have you been told about how long this counseling might last?

A. Well, the estimate I was given by Miss Rafferty was six months to a year. I think that is an unrealistic time frame. With everything that I see happening to my daughter, I feel that it is going to be longer than that until she able to handle all of the feelings and be able to get at everything that has been buried for the last couple of three years.

Q. I know that you are not a psychiatrist or psychologist but can you describe in your own words how she appears to be dealing with this. What is her way of dealing with -

A. She is living in a fantasy world at the present moment. She comes out and deals with the fact of what is happening for a couple of hours at a time either when you telephone or when we take her to see Jeanette Rafferty she comes out and deals with it at that time and only for a very short period 'cause right now that is all she can do to deal with it.

Q. What is your method of dealing with the problems that you have testified to?



A. Right now I am working on releasing all the anger that I have. I have - I'm playing softball right now and I play a lot of racketball which enables me to release the anger that I feel. My way to get rid of it is by exertion and until the counselors that we are seeing can provide a better direction on how to release it this is my only way of getting rid of it right now.

Q. You described yourself and Petty Officer Solorio as very good friends in Alaska. Did that friendship extend until after you left Alaska?

[66] A. It did up until the time that I was made aware of what's been going on. Rich has called my house a couple or three times. I have talked to him at work. His wife has called our house and talked to my wife for a while and on one occasion he stopped by and visited us for a couple of hours because he had been in Portsmouth and he was headed back here to New York. He stopped in Baltimore for a couple of hours and visited on one occasion.

Q. Did he talk to Jenny?

A. Yes he did. He talked to Jenny on the phone on a couple of different occasions and when he stopped by our home.

Q. Was this before or after Jenny revealed what had happened?

A. This was before.

Q. Was Rich Solorio the kind of person that you would trust if you needed a favor, say you were going on PCS or TAD orders or you and your wife were going away and you needed somebody to watch the house, watch your kids. Is he somebody that you can rely on for a favor that involved trust?

A. At one time yes sir.

Q. When you need a favor like that is there one group of people that you would tend to go to more than others?

A. The people that I feel that I can trust are the ones that I would ask for something like this, yes sir.

Q. Do you tend to trust Coast Guard people when you run into a problem like this?

A. Yes I do.

Q. Would you trust Petty Officer Solorio in that way at this point?

A. I would not.

Q. Could you work with him?

A. No I could not.

Q. Can you give us some idea of the magnitude of this revelation on you. Does anything else happen to you in your life like this?

A. No sir.

Q. Is anything close?

A. The only thing that comes anywhere close is the 13 months that I spent in Viet Nam.

Q. And which has affected you more emotionally?

A. The incident with YN1 Solorio.

[67] Q. Where did you spend your time in Viet Nam?

A. I was with the Third Marine division on the DMZ.

Q. When?

A. 1969 to 1970.

Q. What kind of emotional residue do you have from that?

A. I feel that what I did was right by being there. I had trouble dealing with the way that we got kicked out or whatever way you want to put it and I feel that the guys that died over there and came back hurt and that it was a waste. At the time that was what I was trained to do and I felt it was right so I went and did it.

Q. Has this incident - the revaluations that Jenny had made to you effected you in the same way or in different ways as your Viet Nam experience?

A. Totally different. I don't know how to deal with this one. I learned to deal with the ones in Viet Nam. We are a very small service. I know a lot of people in the Coast Guard. This has made me leery of the people that I have worked with before. Will it ever happen again and it has made me quite leery of the people that I work with. The people that I trust. The people that I will let my daughter come in contact with.

TC: That is all I have.

MJ: You may cross-examine.

DC: Thank you Your Honor.

#### CROSS-EXAMINATION

Questions by the defense:

Q. The mobile home that you lived in in Glacier View trailer park?

A. Yes sir.

Q. That was privately owned?

A. Yes sir.

Q. When you were first contacted by Special Agent Ferguson in - when you first spoke to Ferguson and Brenda Watson. That was not at your initiation that was at Coast Guard initiation?

A. Yes sir it was.

Q. You say that you have lost trust in the people that you have worked with. Haven't you lost trust in all men?

A. No sir.

[68] Q. Just Coast Guard people?

A. The people that I work with.

Q. You work with Coast Guard people?

A. Yes I do. I also work with civilians.

Q. You have lost trust with civilian and military people?

A. No sir, I have lost trust with the people I work with.

Q. Have you lost trust with anybody with whom you work with now?

A. No sir.

Q. Would you be more cautious about letting Jenny stay at a civilians house?

A. Yes sir.

Q. Or at another Coastie's house?

A. Yes sir.

Q. Would you let Jenny stay at anybody's house that you didn't know?

A. No sir, I would not.

Q. Would you let Jenny stay at somebody's house even if that individual was a Coast Guard family, if you didn't know them?

A. No sir.

Q. The impact that this offense has had on you would be the same whether it was a civilian or a military perpetrator isn't it?

A. Yes sir.

Q. When you were in Alaska you were having marital problems weren't you?

A. Yes I was.

Q. Did that effect your performance at work at all?

A. No sir it didn't.

Q. Did you have to see a counselor in Alaska?

A. Yes sir I did.

Q. If your marital problems were in Alaska or here or wherever would you hesitate to go unrestricted transfer to a place that didn't have a counselor?

A. Yes sir I would.

Q. So the impact would be the same?

A. Yes sir.

[69] Q. You stated that you trusted Rich Solorio and you were very good friends at one point?

A. Yes sir.

Q. Now you are very hurt?

A. Yes sir I am.

Q. You would be just as hurt if it was another friend or an uncle or a cousin or it was another civilian you trusted?

A. Yes sir.

Q. The first time you met Petty Officer Solorio was at work?

A. Yes sir.

Q. Did you immediately become friends at work?

A. No sir I don't believe so.

Q. Were you involved with Petty Officer Solorio on a basketball team?

A. Yes sir we were.

Q. That was the city league?

A. Yes sir.

Q. You were involved in a bowling league and that was also a city league?

A. Yes sir.

Q. You were involved to some extent in the soccer league. You were the assistant coach if you were asked?

A. Yes sir.

Q. Were you involved with softball or baseball or other leagues?

A. The District had a softball team the one year that I was there and then I played on a civilian team the other two years I was there.

Q. Did Petty Officer Solorio play with you at that point?

A. I don't remember if Rich was on the District's team or not.

Q. If you only knew Petty Officer Solorio at work and your daughter wasn't the same age as Petty Officer Solorio's son do you think that you would have become as good friends?

A. I don't know.

Q. Did your wife work the entire time you were in Juneau, Alaska?

A. We got there in July and she started to work in either September or October.

[70] Q. Did she work until you left?

A. Yes.

Q. Who did she work for?

A. She worked for the Forest Service in the Federal Building.

Q. Did Petty Officer's Solorio's wife also work for the Forest Service?

A. Yes she did.

Q. Did you wife and Mrs. Solorio become friends?

A. Yes they did.

Q. Would consider that your wives were, that you played together, that you bowled, and your children were involved in these bowling and soccer leagues, that was a significant portion of your friendship?

A. Yes sir it was.

Q. How long have you been in the Coast Guard?

A. March of next year will be 10 years.

Q. And before that you were in the Marines?

A. I was out of the service for five years before that.

Q. How long were you in the Marines.

A. 2 years.

Q. So, you have approximately 12 years military service?

A. Yes sir.

Q. You are proud to wear the Coast Guard uniform?

A. Yes I am.

Q. Are you still proud to wear the Coast Guard uniform?

A. Yes I am.

Q. You stated that your daughter Jenny would come to work in 1980 when she was going to Capitol School. Was Capital School a Catholic School?

A. No sir it was a public school but it was located in the city of Juneau about two blocks from the Capitol and the Governor's mansion itself.

Q. Jenny came to work to get a ride home from you, is that correct?

A. Yes sir.

[71] Q. Did you ever come to work at Petty Officer Solorio's invitation?

A. Not to my knowledge.

Q. Your daughter was counseled for a time in Alaska. Do you recall stating that that was not related to any of these matters?

A. Yes sir.

Q. That is still your understanding?

A. Yes it is.

Q. You also stated that the people that you work for are very understanding of your personal situation?

A. Yes sir they are.

Q. Does that up lift your morale?

A. Yes it does.

Q. It's good to have a support in that group?

A. Support from the people that I work for is important and I put out an effort and they understand it and they support what I am doing and they also understand that this a very trying time and they have done everything that can to help me get through his period of my life.

Q. This is a point of clarification, Jeanette Rafferty is currently involved in counseling Jennifer.

A. Yes sir.

Q. And Jeanette is a civilian?

A. Yes she is.

Q. Jenny was involved in bowling from very early in your time in Alaska?

A. The first year that we took it over which was the October of 1981.

DC: No further questions.



MJ: Redirect?

TC: No redirect Your Honor.

The witness was duly warned and withdrew from the courtroom.

The Article 39(a) session recessed at 1455 hours, 3 June 1985.

The Article 39(a) session was called to order at 1500 hours, 3 June 1985.

[72] MJ: This Article 39(a) session will come to order. Please be seated.

TC: Your honor, all parties who were present when the Article 39(a) Session recessed are again present, no party required to be present is absent. Doctor Frank Caprio is on the stand. Doctor Caprio will you rise and I will swear you in.

Captain Frank Caprio, U.S. Public Health Service, was called as a witness for the prosecution, was sworn and testified as follows:

#### DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you state for the record your full name, your rank, your present duty station and your organization and service.

A. My name is Captain Frank Caprio and I am the Senior Medical Officer at the Support Center Governors Island Dispensary. I am also the Third Coast Guard District Medical Advisor. I am also the Chief of Neuro Psychiatry at the Dispensary.

Q. You are in the Public Health Service attached to the Coast Guard?

A. Yes I am.

Q. Doctor Caprio I would like to ask you some questions dealing with both the Family Advocacy program and the range of impacts that might be experienced on children from incidents of child abuse and on the parents of those children. Could you list for the court your professional background. The professional degrees you hold and some of the experience you have particularly in relation to this field that I am going to be asking question about?

A. The subject of child abuse covers many many areas.

Q. First of all, your professional qualifications?

A. I am a physician. I graduated from medical school. I did an internship in the Public Health Service and took part of my psychiatric residency training within the Public Health Service at the Public Health Service Hospital Lexington, Kentucky and at University of Cincinnati and Louisville University of Kentucky and at John Hopkins Hospital and at Shephard and Pratt Hospital in Baltimore, Maryland.

Q. Do you hold any other professional degrees?

A. I received my Medical Degree from Albany Medical School.

[73] Q. Do you have a LLB?

A. No. I went to law school but I don't practice law.

Q. What professional education and training have you had in relation to sex crimes or psychiatry as it relates to sex crimes?

A. I have been practicing psychiatry for the last 25 years. I first became interested in the so called sex offenders at a state hospital in New Jersey many years ago. In fact, New Jersey was one of the first states to have a treatment program at Malboro State Hospital over in Malboro, New Jersey. Ever since then I have been interested in the area of paraphilias or sex deviations and in private practice in Washington, DC and in Baltimore, Maryland I saw many such patients. They were referred to me either from the courts by attorneys or school officials or other physicians and I treated many such patients and I served as an expert witness in many cases involving paraphilias.

Q. Does defense counsel have an objection to Doctor Caprio being qualified as a expert witness in these limited fields that I have outlined?

A. No Your Honor the defense counsel does not object.

MJ: Let me ask you, do you have a CV or other summary of - just for records purposes?

WITNESS: Yes I do Your Honor. I don't have one with me but I think Lieutenant Commander Couper does or if not I can obtain one.

TC: Shall mark this an exhibit, Your Honor?

REPORTER: It is Appellate Exhibit XI.

MJ: Appellate Exhibit XI is accepted and I will accept Captain's Caprio's qualifications to testify as an expert witness.

Q. Doctor Caprio, are you involved at all in the Family Advocacy Program in the Coast Guard?

A. Yes I am.

Q. In what capacity?

A. In two ways actually, as the Chief of the Neuro-Psychiatric Branch here and also as the Senior Medical Officer at the Dispensary. I am often asked to evaluate active members and dependents that are involved in problems of family abuse that are referred to the Family Advocacy Program. I mainly do psychiatric evaluations and I still do some counseling.

Q. Have you been involved in a policy making role in the Family Advocacy Program?

[74] A. Yes I have. As a matter of fact approximately ten years ago I was the Coast Guard's representative to a what we referred to as a tri-service, actually it included the Coast Guard too, Family Advocacy Program and we formulated policies that created the Family Advocacy Program for the United States Coast Guard.

Q. Can you briefly summarize the service the policy that underlies present Family Advocacy Program?

DC: Objection. Your Honor, again we are getting into the policy. The question is fact. We have had questions dealing with moral or reputation. Policy doesn't impact what the effect is. Policy is simply policy. It should not be used to show the offenses are service connected.

MJ: I will over rule the objection subject to the same considerations in previous rulings that the policy that exists may be considered in the context of the existing service policy.

DC: I take that ruling to mean that you are not considering that the policy dictates the impact?

MJ: I am not going to rule in advance on evidence that I haven't heard.

Q. Doctor Caprio, can you tell us briefly if you know the underlying policy that is behind the Coast Guard's Family Advocacy Program?

A. Yes. Basically, the policies were all generated to create a—what we would refer to as a therapeutic environment for both active duty members and their dependents, also for retirees. But it mainly concerns active duty members and their dependents. It includes a whole host of problems usually psychopathology. Child abuse which includes actual physical abuse, sexual abuse, neglect and it includes also in addition to the child abuse spouse abuse. And basically that was the reason that we created the Family Advocacy Program to handle these major intra-family problems. We have developed therapeutic intervention programs all governed by policies to intervene when we find out about such problems. The military basically follows civil policies in the area of Family Advocacy. Many communities have similar programs.

Q. What impact do these therapeutic intervention programs and Family Advocacy Programs in general have on the active duty member in the family?

A. It varies, depending upon the active duty member's involvement. If the active duty member is the one that doing the abuse, either spouse abuse or child abuse, then by intervening we hope to correct this so that the member will desist. Sometimes it involves actually discharging the member from the Coast Guard. If it doesn't involve the active member but a dependent, then we [75] often have the active member involved in the therapeutic process. Usually if it is the father, husband, then we usually bring in the wife also. So, in one way or another, usually impacts on the active duty member.

Q. When a situation of child abuse from an outside of the family source is encountered, that perpetrators outside the family, is that kind of situation any greater or a lesser problem in the military then it is in civilian community or a problem with a different quality?

A. Do you mean if the father is not the perpetrator?

Q. If a source outside the family is the perpetrator?

A. If the father is the perpetrator as you can expect it creates dissension usually between the father of the child and the mother of the child. They are usually husband and wife. It is possible that they may not be husband and wife but usually



that is the case and it creates a lot of dissension. If the perpetrator is outside of the immediate family constellation then that is an entirely a different situation. There, often times it doesn't create such dissension, unless the perpetrator is an ancillary family member, an aunt or a uncle, a sibling, a grandparent, then it can create a lot of family strife.

Q. Briefly, what are the range of emotional and physical impacts if any, on a eight to eleven year old female child who is sexually abused by someone outside the family?

A. Most often the parents never learn of this. We suspect this. It is hard to come up with absolute figures but most cases of child sexual abuse are not discovered by the parents. The child never divulges this. The child may tell a peer, a friend, a counselor, a minister, a therapist later on that they were involved in prepubertal sexual abuse, but they never tell the parents. So, in most cases it has no effect on the parent because the parent doesn't know. The parent is kept ignorant and naive but, if the child divulges what happened to the parent usually the parent becomes very emotionally upset, angry, incensed. They don't really know what the child thinks and feels. In fact, often cases, the parent becomes more upset than the child. The child is living through a whole host of new life experiences and this may be another one. Most cases of child sexual abuse do not involve intercourse. They involve touching, rubbing, caressing, looking, but they do not involve intercourse.

Q. If I can return once again, just for a brief list of those types of emotional and physical symptoms in an eight to eleven year old child who was sexually abused, and then we can go into the impacts on the parents but for right now the impacts on the child. What are the range of different types of impacts?

A. Usually the child—most children that are sexually abused are in the age of eight to ten. They are prepubertal. They can [76] be younger, they can be older, but statistically as far as we know most of these children are in the age of eight to ten. They have some concept of what's going on but not a full understanding. If it involves heterosexual girls, in

other words the abuser is a male—an older male, ten years by definition—we refer to it as some one who is ten years older. And there can be homosexual or heterosexual abuse.

If I can cover heterosexual abuse first. These girls are young they have not reached menarche yet. They are not having menstrual periods. As a result, some of them are very sexually naive. No one has explained menarche to them, reproduction. They have some sense of what's right and what's wrong but it is not in the context of an adult of sex. Most of them are very naive sexually but they have some idea that this is wrong or that they should not be doing this. Many of them are very curious though. In fact, it is the first time they have seen a male nude body. If the male, if the abuser, the perpetrator is nude. Often times they are not. So, part of it is curiosity. That is one of the emotional feelings. Part of it is an immediate sense of wrong doing or guilt later. There may be some contriteness over what they did.

Then usually the perpetrator or the abuser tries to ensure confidentiality and there may be a threat of violence. That sometime happens. That if the girl divulges the information that the perpetrator will then inflict some kind of harm, embarrass her or even hurt her. That's a threat. Very few perpetrator's engage in violence statistically that we also know. There may be the threat of violence but usually there is no violence. What happens is, if the little girl tells a peer and the peer tells someone else and it eventually gets back to the parents, the parents usually react in a very emotional way. They become very upset and it's this reaction that the child witnesses and then the child realizes, "Wow, this is an unusual thing. This must be a very bad thing that happened because look at what mommy and daddy are doing." A child learns through witnessing this reaction—the discovery that this is a very bad thing. Those are usually the emotional responses. Now, if there is a threat of violence then there is also intimidation and fear. Those are other responses that the child can be plagued with.

Q. What are the social symptoms that a female child displays after the situation and whether it has been divulged or not?



A. It depends on the situation and who the perpetrator is. If it is grandfather—

Q. Outside the family?

A. Outside the family?

Q. Yes.

[77] A. Oh, If it is outside the family, once again, it depends on who the abuser was and what he acted like because there may not be any overt signs or symptoms that this happened. If the child is emotionally upset they may then display concordant emotional feelings; fear, often sometimes withdrawal. There may be panicky fear. There may be problems of a deteriorating school work. The child may seem preoccupied, nervous. They may experience, insomnia but these are all non-specific changes. As I say, in many cases there just are no signs and symptoms depending upon what the relationship of the abuser was and the way he acted with the child.

Q. Would you expect to find personality changes in the situation like I have described?

A. Not true personality changes but changes in behavior are usually what we see. Personality changes are usually something that happens after adolescence but we can see changes in a child's behavior, their demeanor, their normal way of relating to people.

DC: Your Honor, I am going to object to this entire line of questioning at this point. This seems to be going far afield of the service connection issue. It is going to affect in the child and the personality changes et cetera. Whether that effect is service connected or not is something not related to this portion of this testimony.

MJ: Do you intend to wrap this—

TC: I am going to move on Your Honor.

MJ: Well tie it together is what I am looking for. Your objection is well stated and counsel should be sensitive in that regard.

Q. Doctor Caprio, on the emotional impacts on the parent of the abused child, could you list the various types of emotional and physical reactions that you have clinically seen in parents that are going through this?

A. Yes. Usually, since the parents were not there they don't really know what happened and they'll ask the daughter or the son, sometimes it's the son with an older woman or more commonly with an older male homosexual perpetrator but the parents weren't there and as a result they really don't know what happened. Some of them are too embarrassed to ask their children. So, it's just left in the realm of the unknown. They never will know but oftentimes the parents will find out generally what happened and they will be very upset, very angry. In fact, a lot of parents become very very emotionally upset, very, very angry. They would just as soon have the perpetrator incarcerated, removed from society. Some feel that the person [78] should be given the death sentence and all sorts of things. They worry about—they are not only apprehensive and anxious but they are worried about the future, the unknown, what effect will this have on their child in future years. Will they be normal, will this have an irrevocable detrimental effect on the child. So, a lot of it is just the unknown.

Q. From your clinical experience, can you compare the magnitude of the emotional reaction of the parents and children with any degree of reliability?

A. In fact, parents have said to me, "I wish this had happened to me instead." Sometimes the parents will say to me, "It is so bad, what happened, that I wish I were dead. I could accept my own funeral better than having to go to a funeral and seeing my child in the casket. That I could not cope with." They do but they feel they couldn't, unless a parent is forced to go through that situation. They just can't imagine or comprehend how they could ever deal with some odious or heinous situation like that.

Q. What type treatment is available both for the parent and for the child in general?

A. For the child we have a whole host of treatment modalities, all the way from counseling, individual and group psycho-therapy and spiritual counseling. There are a lot of different treatment modalities. Now unfortunately, statistically most children never become involved in treat-

ment. If this happens, then that is it. There is no treatment made available to the child or the parents. Perhaps some counseling but no long term therapy.

Q. Are there cases where treatment is absolutely indicated?

A. In most cases treatment is indicated but whether it is available and whether the family wants to pursue this, that's another matter.

Q. Are the resources for treatment available at all Coast Guard Stations?

A. No. Not at all Coast Guard Stations. The large Coast Guard bases, yes, such as Governors Island, Cape May, the Academy, Kodiak, Alameda. But in most, the Coast Guard does not provide the treatment directly, but they can refer out to different agencies, Most Coast Guard personnel or Army, Navy, and Air Force do have resources available even though they may not be offered by the service itself.

Q. As a medical officer if you had a family who was undergoing counseling for—the dependent daughter had been sexually abused by someone outside the family and you believed that counseling was necessary, would the military member be [79] available for unrestricted duty at any Coast Guard station that the Coast Guard might send him to.

A. Well it could—It often times makes it difficult. If we have initiated counseling then we would like to pursue this for some period of time. So, that we would make a request that the active duty member not be transferred until we felt that the therapeutic and intervention had reached a certain point in stage with a resolution of conflict; but then, after that, we would lift the recommendation so that the member would be designated for unrestricted assignment.

Q. So there would be a period of time where a member would not be available for unrestricted transfer?

A. We would make that recommendation, right.

TC: That's all I have.

MJ: Cross-examination?

DC: Thank you Your Honor.

#### CROSS-EXAMINATION

Questions by the defense:

Q. During that period of time where you would make that recommendation. Have you ever had an instance where the recommendation was denied?

A. I don't recall off-hand where it was denied.

Q. Assuming that the member was transferred, if there wasn't Coast Guard facilities available, there would more than likely be facility in the community?

A. Yes that is right. These facilities, for the family, not the abuser. In fact, it is a lot easier do therapy for the family then it is for the abuser.

Q. Doctor did you have an opportunity to interview Petty Officer Solorio?

A. Yes I did.

Q. At that interview—well, what is a pedophilliac?

A. In the classification of psychosexual disorders there are four main categories. Gender, identity, paraphilias, sexual disfunction and a fourth category involving ego—dystonic homosexuality. A pedophil—pedophilliac disorder falls under the second category; a paraphilia which used to be called sexual deviations and now we call them paraphilias. Para, meaning a deviation, and philia referring to an attraction. So this is a sexual deviation under the paraphilias. There are several main behavioral disorders. Pedophilia, feticism, transvestism, [80] sadism, masochism, voyerism and exhibitionism. So it falls in that category. Basically is a sexual deviant or a paraphilic who is attracted to prepubertal children.

Q. Are all sex abusers pedophiles?

A. No. As I just mentioned there are all types of sexual abusers and sexual deviants but a pedophile is one by definition and this is an arbitrary definition but its borne out by clinical experience—that usually the pedophile is either a homosexual or a heterosexual and is ten years older than the prepubertal girl or if it involves a male homosexual the boy is about the age. Although in homosexuality in pedophilic homosexuality is not necessarily restricted to eight or ten. Now what happens in the psycho-sexual disorder involves psychodynamics where the pedophile is sexually aroused by a child, not the usual heterosexual attraction to an adult. They could be even an adolescent, but they are sexually aroused by a young girl who usually very sexually naive at that age.



Q. Doctor are all sex offenders by definition sexual deviants or do you have to be a deviant to be a child sex offender?

A. No. In fact a rapist is not considered a sexual deviant. They may rape a young girl—that's for anti-social act so to specifically answer your question. No, they don't have to be.

Q. When you interviewed Petty Officer Solorio could you determine whether he had pedophilic tendencies?

A. No I couldn't. In fact he denied that he was sexually involved with these young girls.

Q. Getting to the Family Advocacy Program, as far as impacts, the Family Advocacy Program as I understand it is designed to respond to various impacts, is that correct?

A. And to act prophylactically to prevent family abuse.

Q. But the program itself doesn't have an adverse impact?

A. No.

Q. In fact it lessens the impact on the Coast Guard active member of a family from a sex offense?

A. Hopefully.

Q. You talked for a bit about the effects upon a parent when their child is sexually molested. We intimated that the parent is a victim too. Isn't it true that a parent is a victim whenever a child suffers from disease or any particular accident?

A. Yes that's often the case. The parent can emphasize with the child and that is very true.

[81] For example, if the child was suffering from cancer, terminal cancer or let's say non-terminal cancer would that cancer have an impact on the parent.

A. Yes it would.

Q. If a child was involved in a car accident and the parent witnesses the car accident again, would the parent be considered a victim in that sense.

A. Not necessarily a victim but they would feel for the child there would be usually be a great empathy. Particularly if the accident was caused someone outside the family. If it was caused by a family member it might be a different feeling. If it was caused someone outside the family, the family would usually be angry with them usually, mad at them for doing this to their child.

Q. A similar type of anger that a parent of a sexual child abused might be—different context but similar extent to the anger?

A. No, because most parents could understand an accident. They can't understand the thinking though of a sexual deviant. To them it's a very abnormal and they can't empathize at all. If the parents would never do anything like that they couldn't imagine how come somebody else. They could imagine, on the other hand perhaps causing an accident, so, it is different.

Q. As far as the impacts on the parents with regards to a car accident. Is it a stronger on the parent to witness the accident or just to see the effects after the accident has happened.

A. Usually if they witness the accident it has a stronger emotional impact and there is a remembrance, the imagery.

Q. Accompanied by anger?

A. Yes.

Q. The difference between the pain that the parent feels from a child involved in a car accident for instance or a child involved in sexual abuse; is there anxiety and the uncertainty about the future? Is that a correct characterization?

A. That may not be in all cases. They may accept the accident as truly an accident. The other driver or whatever didn't intentionally do this and they may accept it as an accident. If the driver were on drugs or were intoxicated there may be less acceptance. The parent may feel that the person had some voluntary component in this. Where as in the case of the sexual offender, the act was only committed but the parent may feel that the perpetrator suffered some kind of psychiatric disorder and they don't understand it. They just can't comprehend why someone would do that. Why they would be interested in doing something like that. So, there is the unknown. Of it the perpetrator were psychotic, that is even a [82] more classical example. If the perpetrator shot a family member and it turned out that the perpetrator were psychotic, they wouldn't understand that at all.



Q. And the pain that the parent feels, car accident or cancer or child abuse, substantial in all cases?

A. The pain—what they experience. The discomfort. The unpleasant emotion feeling. The feeling may be the same even though the etiology of it may be different.

DC: Thank you doctor.

TC: No redirect, Your Honor.

#### EXAMINATION BY THE COURT

Questions by the military judge:

Q. Doctor let me follow up on that very last point that you were just talking about and ask—take it out of a parent context. My concern is more with the trial process where we have non-parent adult individuals who come to know of events, hear evidence, jury members if you will. Is the same reaction that you described for parents, as far as this lack of understanding and this feeling that the perpetrator may interpret from some kind of a psychotic disorder, also a tendency in this more detached relationship. Is this a common assumption?

A. Yes. There may not be much empathy because it wasn't their child, although the individual, whether they are a member of the jury, a policeman, a therapist, may have some empathy. It's not their family member but it is still very perplexing for such an individual to comprehend what's going on in the individual's mind. In fact it may go beyond just whatever did happen and they may think, "My gosh, this person is capable of doing all sorts of things, they don't think right. What else is the person going up with or do." That is what often they think or they may empathize "Gee, I wouldn't that to happen to my daughter or son," and they may feel that way.

MJ: Counsel, I point out that my question probably goes to the second motion that isn't before me now yet. I am just shorting cutting, if you will. It is subject to objection like all questions are—this line of questioning, but if we get to that second motion I think this is relevant.

TC: Yes Your Honor. I have one question in that connection too.

Q. Let me—I think you may have answered it. I'll just ask again. The desire to understand the mental process of an alleged perpetrator, is that a normal or natural reaction from this detached person who comes to have knowledge?

[83] A. It usually is very normal, I can tell you that Your Honor. So many people have asked me why do these people do that. Is is very, very normal to be inquisitive as to what make this person think and then do what they do, whether they are a pedophiliac or zoophilliac or carprophiliac or whatever, is right. There is a natural curiosity.

Q. Is there a tendency to classify it just as you just did?

A. No, because the average person doesn't know much about psycho-sexual disorders.

Q. Even in the average person's mind, is there a tendency to classify?

A. Yes in the sense that they, the perpetrator may be involved in say pedophilia but the average person, because they don't understand what makes a pedophilic think and behave the way they do, they wonder what else will this person do unusual or abnormal, that's right. They don't realize that the pedophiliac usually—that's the only unusual thing that they do, it's just restricted to that and they don't realize that the pedophiliac is not psychotic either. In fact the pedophiliac is usually married and has a family.

MJ: You may continue. Thank you.

#### REDIRECT EXAMINATION

Questions by the prosecution:

Q. Doctor Caprio, I believe that you testified with respect to pedophilia that that is an attraction to prepubertal children?

A. Right.

Q. Does that attraction tend to remain the same over the course of say a year or two or can it change either due to therapy or behavior changes or any other outside influence?

A. Almost by definition pedophilia is usually is a chronic condition. It's even more so if it involves homosexual pedophiliacs. Mainly, an adult male with a young boy. In the case of heterosexual, where the victim is a young girl and the male perpetrator is at least ten years older; that is less

chronic than the homosexual pedophilia situation, but they all are amenable to therapy. Now, whether the therapy is successful or not that is a different story. In fact, usually if the behavior is—it can be modified—it can be—the actual behavior of but the actual intrapsychic thinking doesn't usually change. If the person is a pedophiliac, almost by definition, they're are going to stay that way. There will always be a sexual attraction toward children. What they do about it is a different story. In fact, if there is discovery of this and a lot of adverse publicity—if there is legal involvement, then the individual may [84] refrain but you have to remember a lot of pedophilia goes on without any complaints. A lot of adults are into pedophilia and they have consenting children. In fact, this has become quite vogue in recent decades. That is pedophilia, but that is a different kind of pedophilia.

Q. For the pedophile, then behavior can change for any number of reasons, but the love object remains the same or the love—

A. The love object remains essentially the same. That is right.

MJ: Recross.

#### CROSS-EXAMINATION

Questions by the defense:

Q. Doctor the love object remains the same. That is only assuming that the individual is a pedophiliac?

A. That is right.

Q. If he was or she was just a sex offender without pedophiliac tendencies, there is usually no love object as far as young girls—

A. Usually there is a love object. There may not be a little girl. It may a adult girl but an adult girl is not available. So the individual will turn to a young girl and because an adult consenting women is not available, and the individual may have a sexual involvement with the child and it looks like that is an incidence of pedophilia but really it isn't, in that the adult is not a pedophilic.

Q. Assuming whether or not you have a sure pedophiliac, if an individual is accused of a number of crimes involving young girls, is it more likely for a jury to believe that he would be involved in other crimes?

A. It depends on the knowledge of the jury or the whole area of psycho-sexual disorders and what they are told if they haven't done much reading, it would in large measure be probably what they are told while they are hearing the case.

Q. Assuming an individual was accused of committing various crimes against young girls but charged with other crimes. At that point would it be more likely for a court or jury to believe that he actually committed the crimes charges based on the fact that there was evidence show—

A. Unless the jury were educated to the contrary, I think that that would probably be the case.

DC: No further questions.

[85] TC: No further questions.

The witness was duly warned and withdrew from the courtroom.

TC: Your Honor I neglected to ask you to review the stipulation of expected testimony of Jennifer Ann Grantz so I assume that you may have done that in any case?

DC: Your Honor I also neglected to hand you a copy of the proposed findings of fact.

MJ: Those I have received from the government—received from the defense although the government if they haven't been should be also marked as an Appellate Exhibit. The proposed finding of fact should marked as Appellate Exhibits in order, the government's first then the defense's. I notice that the copy of the government's is marked "Proposed Special Finding". What I am looking for here and what I thought I covered in the order was essential findings of fact under the RCM to make findings on the motions, particularly this motion on jurisdiction which are a little bit different than special findings.

TC: Yes your honor.

MJ: So even though you call them special findings you prepared them as essential findings of fact?

TC: That is correct, they were all directed towards this motion.

MJ: Where are we on this motion? Anything else?



TC: Your honor, a Special Agent will testify briefly, I hope, to the division of effort between Coast Guard investigators and Alaskan investigators and I have one other potential witness but I would like to speak to him very briefly, perhaps I can do without him. That would conclude the government's case -

MJ: You have two more witnesses on the motion?

TC: Yes your honor.

DC: I have two witnesses your honor on the motion.

MJ: It is four thirty, what is counsel's desire on the length of the day, obviously it doesn't appear we are going to finish the motion today.

TC: I don't know how long the defense witnesses are but I believe the government witnesses will take five minutes on my part each.

[86] DC: Your honor, I think we can continue.

MJ: For anticipated witness, let's proceed with the short government witnesses and pick it up in the morning.

DC: In that case I would like to tell my witness to go home, she has a sick child.

REPORTER: Your honor, the defense proposed finding of fact is marked as Appellate Exhibit XII and the government's proposed findings are marked as Appellate Exhibit XIII.

MJ: Let's take a short recess in place, carry on.

The Article 39(a) Session was recessed at 1635 hours, 3 June 1985.

The Article 39(a) Session was called to order at 1637 hours, 3 June 1985.

TC: Your honor all persons who were present when the 39(a) Session recessed are again present, no person required to be present is absent.

Special Agent Gary Smith, U.S. Coast Guard, was called as a witness for the prosecution, was sworn, and testified as follows:

#### DIRECT EXAMINATION

Questions by the prosecution:

Q. State for the record your full name, your military affiliation and present duty station.

A. My name is Gary Smith, military affiliation is the United States Coast Guard, my present assignment is Commander, Third Coast District office of intelligence and law enforcement.

Q. Special Agent Smith what position have you occupied in the investigation of the charges of child molestation against Richard Solorio?

A. I am the control agent.

Q. What is your job as control agent?

A. Managing the investigation of the charges.

Q. In connection with the charges against Richard Solorio has the investigation been broadened at all beyond just Coast Guard dependent victims.

A. Yes sir.

[87] Q. Have Coast Guard agents interviewed the Coast Guard dependent victims?

A. Yes sir, they have.

Q. Would you normally receive reports, in the course of your job as control agent, if a state happened to interview Coast Guard witnesses or Coast Guard dependents?

A. Yes sir, I would.

Q. Have you received any reports that the State of Alaska has attempted to interview Amber Johnson, Jennifer Grantz or either of their military fathers?

A. No sir.

Q. Have you received any reports that the State of Alaska has interviewed witnesses?

A. Yes sir.

Q. What was the general nature of the reports that you received with regard to the activity of the State of Alaska?

A. The State of Alaska is, in conjunction with our office in Alaska, conducting investigations concerning civilian personnel and or dependents living in Alaska at present.

Q. Concerning civilian personnel?

A. Yes sir, living in Alaska at present.

Q. Have Coast Guard investigators interviewed any witnesses regarding potential or alleged victims of Petty Officer Solorio who are not Coast Guard dependents?

A. Yes sir, they have.



Q. What action have you taken as control agent when a lead is developed regarding a alleged victim of Petty Officer Solorio who is a civilian?

A. Notify my counter part in that district who notifies the local law enforcement, in Alaska they would notify Alaska Public Safety.

Q. Can you give any specific instances of when this particular procedure that you have just described, a lead concerning a civilian victim?

A. Yes sir, in searching for a, so far not further identified, young lady named Tanya we have looked for and a young lady named Heather.

Q. When leads are developed that involve civilian victims, what action have you taken to turn this over to the State of Alaska?

A. I don't understand the question.

[88] A. What action have you taken to turn these undeveloped lead over to the State of Alaska?

A. We notify the Alaska State Police.

Q. Have you received reports of them following up on undeveloped leads?

A. Yes sir I have.

Q. Do you have a specific example of that?

A. I am trying to think by name. Yes sir, they have interviewed a young lady by the name of Vinnie Tullos concerning any information she may have or alleged acts.

Q. Have there been any division of responsibility or division of effort between Coast Guard and Alaskan investigators in this case?

A. Yes sir.

Q. What is that division?

A. The Coast Guard is handling the military dependents, the military people and the Alaskan State Police are interviewing the civilians.

TC: That is all I have.

#### CROSS-EXAMINATION

Questions by the defense:

Q. Has (oil) in either the Seventeenth district or the Third district, you being involved as control agent, turned over the reports of the offenses dealing with Amber Johnson and Jennifer Grantz to the State of Alaska?

A. Not to my knowledge sir.

Q. Have you provided the State of Alaska with any information dealing with those reported offenses?

A. No sir.

Q. Not your office?

A. No sir.

Q. Are you aware of any other offices that have?

A. Not to my knowledge.

Q. Alaska is continuing to interview possible civilian victims?

A. I don't understand the question sir.

Q. You said that Alaska has been interviewing an individual named Tanya or looking for an individual named Tanya and an individual named Heather.

[89] A. Yes sir.

Q. They are continuing that search for those persons?

A. Yes sir.

Q. That is obviously with an eye to prosecution, is it not?

A. I don't know sir.

Q. But your investigation does continue.

A. Yes sir.

TC: No further questions.

MJ: Is there redirect?

TC: No your honor.

The witness was duly warned and withdrew from the courtroom.

TC: Your honor I request a few moments to see if this last witness is really essential or if there is really anything to add.

MJ: The court will be in recess subject to call, carry on.

The Article 39(a) Session was recessed at 1645 hours, 3 June 1985.

The Article 39(a) Session was called to order at 1648 hours, 3 June 1985.

TC: Your honor all persons who were present when the 39(a) Session recessed are again present, no person required to be present is absent, there is no witness in the hearing room.

MJ: Is that all you have on the motion?

TC: Yes your honor, the government has no further evidence to present on this motion.

MJ: And you had something you wanted to present or mention on the matter that I deferred on the letter from Alaska.

TC: Yes your honor, in addition to the grounds asserted by the government previous which is basically the hearsay exception which I admit does require some disclosure but I had no indication from the defense that he was going to object in this way to the letter. The government would propose that the letter is a letter of a regularly conducted activity under Rule 803(6). The comments through Rule 803(6) indicate that exception 6 permits records of regularly conducted activity to be admitted as [90] an exception to the hearsay rule. The guarantee of reliability in the regularity of the record keeping in reliance of business, however, the military provisions is generally from the Federal Rule but the definition of business is expanded. A business entry is defined as "any memorandum, report or date compilation". I assert that what we have is a memorandum or a report concerning accidents, opinions or diagnosis. We have a decision and opinions or asserted rationale in that memorandum or report. From information transmitted by the person with the duty to the business and with the knowledge of the information. Prosecutors are in the business of making prosecutorial decisions. Sometimes they memorialize them, and I believe your honor could take judicial notice that in cases which involve both civilian and military law enforcement implications that it is common practice to memorialize a decision of a prosecutor to prosecute or not to prosecute and to inform the effected military command. The final element is that the information is recorded in the regular course of business. This is a regular activity, it is common practice to provide these reports to the military. The term memorandum is broadly construed so that according to these comments that virtually any document may satisfy its mandate. For instance, we know from *Strangstallein*, *Case*, and *Porter* that lab reports or forensic reports can be admitted without the testimony of a chemist. I believe *United States v. Power*, 12 MJ 129 Court of Military Appeals 1981 dealt with the receipt in evidence of report and that court indicated that indicated that judicial notice could be taken that a crime laboratory is a place in which scientific methods are

applies and the testing and analysis of various items in connection with the detection and prosecution of crimes. In the instant case it is not necessary to go that far with judicial notice, merely that is the business of the prosecutors to make prosecutorial decisions and very often those decisions are memorialized. We don't have an objection to the authenticity. It was the governments position that this is a record of a regularly conducted activity. There isn't any objection that the foundation is in essence can be provided by judicial notice in the same way that *Strangstallein* and *Porter* take judicial notice of the regular practice of labs. Your honor can take judicial notice of the regular practices of prosecutors in informing the military of their decisions to prosecute or not to prosecute and giving reasons why or not they have considered the way they have. That is all I have your honor.

MJ: Defense response.

DC: Yes your honor, the defense would first like to note that it is not the duty of the defense to inform the government of its grounds for objection. It is the job of the government to anticipate especially when it knows it is offering hearsay evidence. Secondly, if any of the 803 exceptions is applicable, 803(8) is a public record report not 803(6). It is certainly [91] more appropriate since a the record with the State of Alaska letter head appears on its face to be a public record, if it is a record of regularly conducted business at all. But under 803(8)(b) specifically excluded are matters observed by policies and other personnel acting in a law enforcement capacity. This is clearly a law enforcement capacity. This is not regularly conducted business it is a response to government's request, the defense believes, to defer prosecution. The defense contends that Alaska was encouraged to defer and in that it was a law enforcement decision it was made in a law enforcement capacity and that is specifically excluded by 803(8). As for my objection under the hearsay rule, I renew my objection that there are so much surplusage in this that it was irrelevant to the issue at hand and should not be admitted or considered with regard to this motion. I would further like to say that *Strangstallein* and *Porter* talk about laboratory reports and those are reports made in the regular



course of business, it is the regular course of the business to analysis and make a report. The regular course of the State of Alaska is not to respond to the Coast Guard advising them whether or not they will defer prosecution. It is a very rare occurrence indeed. Again, even if that was a regular course of business, it is excluded by 803(8).

TC: One brief response, as defense counsel indicated there is an exception for things observed by law enforcement officials we are not dealing with and observation of the State Attorney from Alaska, we are dealing with his recorded mental process. So we don't have a situation where facts extrinsic to a document are being offered for the truth of those facts. In which case there is a clear confrontation if we are offering mental process and recorded decision of the prosecutor and as I pointed out if your honor regards it on the residual hearsay rule there is a stipulation available that indicates defense counsel and prosecutor have contacted the same Louis Menendez and he indicates that if there is no jurisdiction he may reconsider. So there is adequate indication of reliability in that recorded thought process of Louis Menendez.

MJ: Again, I am not going to deal with any stipulation that is in the air. If counsel want to offer a stipulation that option is open, but I will not base any decision on any verbal agreement or representation of it. Are both counsel clear on that?

TC: Yes.

DC: Yes.

MJ: Other matters?

[92] DC: Your honor, the defense would request that if you do decide to admit the State of Alaska letter the defense has requested and the government has not complied with the defense's request to receive the letter which initiated this letter, the letter from Commander Couper to Attorney Menendez and any other correspondence that is in the possession of the government.

MJ: That doesn't go to its admissibility for the purpose of the motion.

DC: Not this, the letter's admissibility assuming that you decide to admit it the defense request that we have the opportunity at the very least to view the letter.

MJ: What does that go to then?

DC: The request.

MJ: What is the purpose of your request then to see the initiating letter?

DC: The purpose of seeing the initiating letter is to see where this letter came from and that request was made prior to the decision whether or not to admit this document.

MJ: For what purpose do you want see the initiating letter?

DC: The defense believes that it will indicate some of the intention and motive behind the State of Alaska's deciding to defer prosecution.

MJ: But what good will it do you then?

DC: I can't say for sure until I see the letter.

MJ: Why do you want to see it then and not now?

DC: I wanted to see it when I made the request. You had set a deadline of 28 May for the government to comply with discovery. That was when I requested it and was when I wanted to see it.

MJ: Do you feel that—lets clarify this for record purposes. Do you feel now that this government has not complied with legitimate discovery requests?

DC: Yes your honor, we do.

MJ: And what was—when did you request this letter?

[93] DC: Request for discovery was served on the government on 23 May 1985.

MJ: Is that request part of the record?

DC: No your honor, it is not.

MJ: Do you choose to make it part?

DC: Yes, the defense request that it be made part of the record.

[The defense's request for discovery was provided to the reported and marked as Appellate Exhibit XIV.]

MJ: This is the only outstanding matter on that request?

DC: Yes your honor.

MJ: Government position?



TC: The government's position is that that document is attorney work product. The government stands ready to turn it over to your honor to determine if that is the case. That it occupies the same status as legal research, discussions with witness and that it is not properly discoverable.

MJ: Do you have any authority? Either counsel.

DC: Your honor, the defense doesn't have any authority but contends that it is partial to the transaction that led to the letter from Alaska stating that they will defer prosecution. The defense contends that it is discoverable and should very possibly be made part of the record.

TC: Your honor, the government will rely on first of all the fact that Rule 7801 under document tangible, objects and reports that this particular document doesn't fall under any of the specific listings there and that under 701(f), information not subject to disclosure, nothing in this rule shall require the disclosure or production of notes memoranda or similar working papers prepared by counsel and counsel's assistants and representatives.

MJ: Is the government is willing to permit *in camera* examination for the purpose of whether or not I can admit for consideration on the motion?

TC: Yes your honor.

[94] MJ: I think I better with the understanding that I will bifurcate that process and consider it for the purpose in the first instance only and then only if I find that it is discoverable—then it still has not been offered for purposes of the motion so will not consider it for purposes of the motion at this time.

DC: Your honor, the defense would also note that it is under Rule 701(f) that is the description of work product and there is no question that work product is not discoverable, the issue is, is this work product? You have notes, memoranda, and working papers, that is kept within the control of the attorney who created those documents, but once those documents become part of the correspondence that leads to an official record, that leads to a document offered into evidence for consideration it loses that characteristic of work product and therefore should be discovered.

TC: Your honor, I will turn over this document 5813 dated April 26, 1985 for your *in camera* inspection.

[The military judge was provided with the government's above stated letter.]

MJ: This will not become part of the record at this time, it will become part of the record at a future time without regard to my ruling, but right now this is *in camera*.

DC: Your honor, one more point, as trial counsel just mentioned this is letter 5813, the fact that it has an SSIC number on its face would take it out of the work product mode and and put it into official document and put in in control of the government.

TC: I'll represent that it is not part of any public record in the government, it is part of this prosecutor's files, but not part of any public file.

MJ: Anything else?

DDC: No your honor.

The Article 39(a) Session was recessed at 1710 hours, 3 June 1985.

The Article 39(a) Session was called to order at 0830 hours, 4 June 1985.

[95] MJ: Good morning, please be seated. The Article 39(a) Session will come order.

TC: Your honor all persons who were present when the 39(a) Session recessed are again present, no present required to be present is absent, there is no witness or member present.

MJ: Defense ready to proceed?

DC: Your honor, before the defense proceeds, has your honor made a decision as to its request for discovery?

MJ: I have and I am going to deny your request and state that there has been no demonstration of a specific need; that the matter is not relevant to the guilt or innocence of the accused; or other wise admissible.

DC: Your honor, the question was not as guilt or innocence but sir only of relevance to the issue of service connection.

MJ: I, in saying other wise admissible, that was certainly considered.

DC: Your honor the defense would call YN1 Richard Solorio as its first witness on the jurisdictional motion.

TC: Your honor, there is procedural matter I'd like to bring up if I may. I do have an amendment to a convening order, I do not have copies so I'll show it to defense counsel.

[The defense counsel was provided the amendment to the convening order to examine and it was then given to the military judge.]

MJ: Where it says vice Chief Warrant Officer B. N. Hanks, trial counsel can you represent that convening authority's intention is to excuse Mr. Hanks?

TC: That is correct your honor.

MJ: I hand that amendment to the reporter for attachment to the convening order. Let me further state that with respect to your discovery matter, I did consider Military Rules of Evidence 502 and 506 as well as the other authorities cited on that point. Would the defense state that any limitations that apply to this testimony?

DC: Yes your honor, this testimony is solely related to the issue of jurisdiction. Petty Officer Solorio will be talking about his relationship with the family of YN2 Grantz and CWO Johnson and that testimony will be limited to that issue and [96] Petty Officer Solorio testifying in this portion does not waive his right to refuse to testify in any later point.

MJ: You may proceed.

The accused, Yeoman First Class Richard Solorio, U.S. Coast Guard, was called as a witness for the defense, was sworn, and testified as follows:

#### DIRECT EXAMINATION

Questions by the prosecution:

Q. State for the record your full name, rank and present duty station and your service.

A. I am YN1 Solorio with Group New York and I am with the United States Coast Guard.

TC: Your witness.

Questions by the defense:

Q. Petty Officer Solorio, are you familiar with CWO Larry Johnson and his family.

A. Yes I am.

Q. When did you first come in contact with Mr. Johnson or any member of his family including his wife or children?

A. I believe I became in contact with the Johnson's first with their kids coming next door to play with my kids. Then I saw Mr. Johnson outside his home and since we were respective neighbors I went over to introduce myself to him and found out he was in the Coast Guard. I believe that one of kids had mentioned to one of my kids that he was in the Coast Guard also.

Q. Did that relationship or friendship with Mr. Johnson and the family develop?

A. Yes it did.

Q. And what activities did you—in what manner did you socialize with the Johnson family, you and your family?

A. Well mostly it was contained in with our kids activities with youth soccer, bowling and they were relatively the same age as each other, Brian and Amber—

Q. Now just for the record, who is Brian?

A. Brian Solorio is my eldest son.

Q. How old is he?

A. At this time he is 12 years old.

[97] Q. Who is Emanuel Solorio?

A. Emanuel Solorio is my youngest son and he is 10 years old.

Q. And the Johnson children, what are their names?

A. Amber Johnson and Carrie Johnson.

Q. Who is the older, Amber or Carrie?

A. Amber is.

Q. Is Amber approximately the same age as Emanuel—Brian, excuse me.

A. Yes.

Q. And Carrie, is she approximately the same age as Emanuel?

A. Yes if not the same.

Q. So your children and the Johnson children became friends?

A. Yes.



TC: Your honor, this is direct testimony and I would object to the leading form of the questioning.

MJ: Overruled for the purpose of these lead in questions.

Q. Aside from the soccer and bowling, was there any other way in which your family socialized?

A. I was on the same bowling team that Mr. Johnson was. We were in a civilian sponsored league in down town Juneau and we were sponsored by the Pioneer people, they sell trailers.

Q. Were you acquainted or friendly with any other of your neighbors in your neighborhood?

A. Oh yes, very much. The immediate neighbors and with basketball and soccer and chess, I belonged to one of the local chess club that I help initiate first start.

Q. Were any of those people in the neighborhood civilians?

A. Almost all of them.

Q. And you were friendly with civilians as well as military people?

A. Well mostly civilians due to just your activities. The Coast Guard didn't have much for outside activities for their military personnel.

Q. Would you have become as friendly with Mr. Johnson and his family if he was not in the Coast Guard?

A. Yes.

Q. What is the basis of that statement?

[98] A. Well because we were next door neighbors and the kids were involved in the same activities and ninety nine percent of the time I ever saw Mr. Johnson was to do those activities and to be next door neighbors.

Q. Did you ever see Mr. Johnson at work?

A. From time to time, like he said we would pass each other in the hall ways and if his office had some dealing with my office for business related work.

Q. If you could assign a percentage or relative weight would your on base or off base contacts have been more significant with Mr. Johnson?

A. It would have to off base as friends and next door neighbors.

Q. How about YN2 Frank Grantz, did you know YN2 Frank Grantz and his family?

A. Yes I do.

Q. How did you become associated with YN2 Grantz?

A. Well we were on the same basketball team and -

Q. Who sponsored the basketball team?

A. The Coast Guard did.

Q. Who sponsored the basketball league?

A. The Juneau Douglas Parks and Recreations.

Q. In what way did the Coast Guard sponsor the basketball team?

A. We were able to get uniforms from them and that saved us a lot of money.

Q. Was there any other support the Coast Guard gave the team?

A. If we were to get involved in local tournaments around Christmas time there was fee for that to participate and we would put in request with Coast Guard morale and they would pay for that entry fee.

Q. After you became acquainted with YN2 Grantz in basketball, did you become acquainted with the family?

A. Yes I did through youth bowling.

Q. How did you become acquainted through youth bowling?

A. Well we went almost every Saturday between October and April for two or three years in a row and Frank would be there and my wife, she worked for the forest service and Frank's wife worked for the forest service and they knew each other from the forest service we would see each other every Saturday. Frank [99] asked me if I could help out with the youth bowling. We were good friends at the time.

Q. Would YN2 Grantz have asked you - in your opinion would YN2 Grantz have asked you to help out in youth bowling if your children had not participated?

TC: Your honor, I object, that calls for speculation as to YN2 Grantz's reason for asking.

MJ: Sustained.

Q. Did your children participate in youth bowling?

A. Yes they did.

Q. Did you attend youth bowling each week?

A. Yes I did.



Q. In what other ways did you associate yourself with Frank's family?

A. Frank called the Juneau Parks and Recreation to have his daughter placed on my soccer team.

Q. What kind of league was the soccer team?

A. It was a civilian sponsored or a city league sponsored.

Q. Were there military and civilian on your soccer team?

A. Yes, Jennifer Grantz and my son Brian.

Q. Were what?

A. They were Coast Guard dependents I guess.

Q. Were any other Coast Guard dependents on that team?

A. The may have been, I didn't make it a point to find out who was Coast Guard and who was civilian.

Q. Would you have become just as friendly with Frank Grantz and his family if he was a civilian?

A. Yes I would have.

Q. What do you base that opinion on?

A. Well, due to our outside activities with the youth bowling and soccer and basketball and our wives knew each other and we were very friendly with each other through the forest service and seeing each other every Saturday and we just didn't have that much participation with the Coast Guard. If the Coast Guard had more activities we may have had more togetherness in that respect.

Q. So what would you say is the basis of your friendship with Frank Grantz and his family?

[100] A. Due to our outside activities with the, I guess mostly with the kids.

Q. Did you now Jennifer Grantz, Frank Grantz's daughter?

A. Yes I did during that time.

Q. Did she have a relationship with any of your sons?

A. Yes, she was about the same age as my son Brian was and they played a lot together.

Q. In your opinion, the fact that the kids played a lot together, did that have an effect on your relationship with the Grantz family?

A. I am sure it did. It got us more closer together since we met more often and I am sure it did.

Q. Did you have any other civilian friends who participated in the soccer, bowling or other youth activities?

A. Yes I did.

Q. Would you consider those people as good friends as you consider YN2 Grantz?

A. Yes.

DC: No further questions.

### CROSS-EXAMINATION

Questions by the prosecution:

Q. Petty Officer Solorio did you ever commute with, then YN1 and Yeoman Chief, Johnson to work?

A. There was a short period of time that we decided to start car pooling.

Q. Was there a reason for that other than just convenience?

A. It was initially for the convenience and the expense and then we made reference that it was also a good idea after my wife quit work because she was running a day care center there at the home and so was Mrs. Johnson. It wouldn't hurt to leave one of the cars there.

Q. When did your wife start that day care operation and leave the forest service?

A. I believe it was '82 December.

Q. So you car pooled after '82 December or did you car pool before then too?

A. Now that I think about it we initially started it by October '82 around that date and then it went on for about a month and a half. Very shortly after my wife started that day care we [101] decided that since I was working long hours to break off the car pool.

Q. Did you know that Amber Johnson was the daughter of an active duty Coast Guardsmen who was a Yeoman in the Seventeenth district?

A. Yes now I do, I mean -

Q. Did you not know that Amber Johnson was a daughter -

A. You mean when I first met her?

Q. During the time that you knew Amber Johnson?

A. Yes I do and she is Larry Johnson's daughter.

Q. Did you know Jennifer Grantz was the daughter of an active duty Coast Guardsmen who worked at the Seventeenth district office as a Yeoman?

A. I didn't look at it that way but it is a true statement.

Q. To your knowledge, did Amber Johnson know that you were in the Coast Guard?

A. She must have, I mean we were next door neighbors and kids say what does your father do.

Q. Do you recall Amber Johnson ever seeing you in uniform or at work?

A. She came in for an ID card towards the last portion of their stay there and I had my uniform on at work.

Q. To your knowledge, did Jennifer Grantz know that you were in the Coast Guard?

A. I am sure she did.

Q. Did Jennifer Grantz ever see you in uniform or at work?

A. I am sure she has seen me at work, I can not remember if I did her ID card or not.

Q. Do you recall Jennifer Grantz visiting you a number of times each week during 1980 and 1981?

A. No I do not.

Q. Was there any period of time when Jennifer Grantz would visit you at work?

A. I cannot remember any time although I did see her up in her father's office a couple of times when I had business dealings with Frank Grantz and I went up there to his office and his daughter would be waiting for him to take her home or something.

Q. Did you receive an allowance from the Coast Guard to defray the cost of housing in Juneau while you were in Juneau?

[102] A. At two points there was housing allowance and rent plus, yes I did.

Q. During the entire time you were in Juneau?

A. Yes I did.

Q. I believe that you stated on direct that you came to know Frank Grantz when you both participated on a Coast Guard sponsored basketball team, is that correct?

A. Yes I did.

Q. What year was that?

A. I believe it was all three years that we were - it had to be the '81, '82 season, '82, '83 season and I think the last year that we were there he didn't play basketball, his wife did not want him to play basketball.

Q. It was after you played basketball with Frank Grantz that you came to know Jennifer and the rest of the family?

A. Yes and with the youth bowling league, before that I just knew Frank.

Q. Do you recall where Petty Officer Frank Grantz was when he asked if you would like to volunteer to help out in the basketball league?

A. He had called me over to his house one day and we all sat down and talked about, me, his wife and himself. He also asked me if I wanted to be an officer of that league, treasurer and I said yes.

Q. Were Coast Guard personnel encouraged to participate in community activities such as you and Frank Grantz did?

A. Not that I am aware of. Being the YN1 in personnel for three and half years and through some of the meetings that would go on I understood that it was the chief's association and the officer's association were encouraged and from time to time they would participate in certain activities. The chief's association would participate in a spaghetti dinner each year for the elderly.

Q. You stated that the Coast Guard did not sponsor that many activities so that the Coast Guard people could get together, is that correct?

A. They didn't - even getting the money for the basketball team was rough. I guess as everybody is aware that the Coast Guard doesn't get that much money and if you were going to get in on outside activities in Alaska you had to formulate them yourself. I spent three tours in Alaska and I know what I am talking about.

[103] Q. So if your children want to participate in soccer or you want to participate in soccer there would be no Coast Guard league like there would be on Governors Island?

A. No Coast Guard league, right.

Q. Did you play on a Coast Guard soccer team?

A. Yes one year.



Q. Do you remember which year that was?

A. I would have to guess it would be '81, '82 year.

Q. Weren't you asked to coach the children's soccer league in part because you participated in the Coast Guard team?

A. No.

Q. Who asked you to participate in the children's soccer league?

A. Juneau Parks and Recs. had contacted me at home and had asked me due to my participation in little league and Juneau parks and Recreation youth basketball.

Q. Was the Coast Guard soccer team that you were on in a league sponsored by Juneau Parks and Recreation?

A. The Coast Guard team I was on?

Q. Were they part of the Juneau Parks and Recs?

A. Yes.

Q. Did you ever ask Petty Officer Grantz or Mr. Johnson to assist you in coaching soccer or bowling?

A. Not assist so much as if I knew that I was going to be working late and Frank was a very good friend of mine and I knew that he was going to be showing up at the game, I would ask him if he would get the kids started so by the time I got there nobody would have had to wait around for me.

Q. You would make these arrangements at work?

A. No it would be either my house or his house.

Q. You would know the previous day when you had to work late?

A. I would always work late. That is how I organized my work, I knew when I had to working on a certain function and servicewides or what ever you have. I organized my work day.

Q. When were you transferred from Alaska to Governors Island New York?

A. 5 June 1984.

Q. Do you know when Mr. Johnson left Juneau, Alaska and where he was assigned?

[104] A. If I remember right, it was June of '83.

Q. Do you remember when Petty Officer Grantz left Juneau, Alaska for his—

A. June of '84 the later part of June of '84. I typed up his orders.

Q. You said that you have been in Alaska for three tours?

A. Three tours.

Q. What is the reputation of the Coast Guard up in Juneau, Alaska?

A. In certain cities we have high—

DC: Your honor, I am going to object to this question as being beyond the scope of direct examination, further the questions have asked and answered by a number of witnesses and it has already been established.

TC: Your honor, I believe the subject matter of the direct testimony is jurisdiction and that is what this series of questions goes to.

MJ: Objection is overruled.

Q. What is the reputation of the Coast Guard up in Juneau, Alaska?

A. In Juneau? I would say we had a very good reputation up there due to our law enforcement and life saving capabilities.

Q. Compared to other communities that you have lived in would you characterize Juneau as particularly close knit because of its physical geographical characteristics?

A. Not necessarily to the geographical location as of the mountain area, I found in the lower 48 you have every thing there to entertain you, you have all these big fairs and big cities, shopping centers. Up in Alaska you don't have so much of that and if you want to have those activities, people have to get together and make a point of entertaining themselves by formulating clubs themselves and outside activities. That is one thing that I liked about Alaska, you went out and made a point of getting involved with each other, with the community.

Q. And since the Coast Guard didn't have that many formal activities for Coast Guard people, it was necessary for the Coast Guard and the civilians to get involved together?

A. If you are saying a lot, like that spaghetti function once a year and some of these other activities once a year, there may have been some but if you are trying to say a lot I would say no.

[105] Q. But if you wanted to become involved in a sport, in



a chess club you would have to go out and form your own team and perhaps even form your own club.

A. Right.

Q. Get civilians and coasties together in order to get number of common—

A. No, I never met a Coast Guard person up there in Alaska that was really that interested in chess. The only reason I played on the Coast Guard basketball team in that first year was because they provided the uniforms and stuff. I was asked by other civilian teams if I would play on their team. I felt, in the first year, some obligation to the Coast Guard. The second year I played, it was due to Frank Grantz.

Q. If an individual in the Coast Guard sexually molested a child, say in a children's league, do you think that would have an impact on the reputation of the Coast Guard in that community?

A. Not necessarily. Alaska is—one thing I like about Alaska is you don't see that type of prejudice or narrow minded view up there in Alaska. If there was one person in the police department who was found guilty, they would not look at the whole police department and say that they were corrupt, like some of the instances here in New York where the police department—some of their members were found using stun guns and many of the comments that I have heard now is that they would think that the majority of the policeman in New York are like that.

Q. So you don't think there would be any impact at all on the Coast Guard's reputation if a member of the Coast Guard was found violating the law in this way?

A. I was—no, they would look at it as a person doing the alleged offense more than so much as an organization. What does the organization have to do with the offense?

Q. If a member of the Coast Guard were involved in sexual molestation of a child dependent of a Coast Guard member, would you expect that that child dependent would be adversely effected psychologically and emotionally?

DC: Objection, Petty Officer Solorio doesn't have any independent knowledge and again it has been testified to by Doctor Caprio and certainly is not within his expertise to testify about the phycological effect.

MJ: Sustained.

Q. If a Coast Guard member was involved in sexual molestation of dependent children of active duty Coast Guard members, would you expect the family to have to undergo counseling as a result of that—

[106] DC: Objection, reasons stated just before the last question.

TC: Your honor, the purpose is not to elicit any expert opinion but merely to establish reasonable expectations of injury in a given situation, who will be injured by a given act.

MJ: Hasn't this been covered?

TC: Not by this witness your honor.

MJ: Sustained.

TC: No further questions.

### REDIRECT EXAMINATION

Questions by the defense:

Q. Petty Officer Solorio, after you stopped commuting and car pooling with Mr. Johnson, how did you get to work?

A. By bus.

Q. And the reason you stopped commuting again?

A. There was a number of reasons, because I worked late and couldn't always meet the car pool during that month and a half, two month period.

Q. Which month and a half, two month period?

A. I would say between October and December.

Q. The period that you were car pooling?

A. That I was car pooling of '82. Larry Johnson, I don't know if I should say this—

Q. Just answer the question.

A. I guess I answered it.

Q. Did the fact that Amber Johnson and Jennifer Grantz were daughters of yeoman, did that effect your friendship with the family at all?

A. That they were yeoman? No.

Q. That they were Coast Guard personnel?

A. No.

Q. During 1980 and 1981, which office were you working in in the Seventeenth district?

A. I was working up in (osr).

[107] Q. Did Amber Johnson or Jennifer Grantz ever come to visit you in (osr)?

A. Not that I remember. I don't believe they did.

Q. Would you say that Amber Johnson or Jennifer Grantz visited you frequently at work, or infrequently?

A. They never visited me.

Q. But, you did see them at work?

A. I have seen Jennifer Grantz up there in her father's office a couple of times and Amber Johnson came in for an ID card.

Q. Did you ever invite Amber or Jennifer to come visit you at work?

A. No I did not.

Q. When you asked for the assistance of Larry Johnson or Frank Grantz to assist in soccer, bowling or whatever, did you ask them to assist you because you knew they were in the Coast Guard?

A. No.

Q. Why did you ask them to assist you?

A. They were friends of mine and since they were a part of that association or that outside activity was the sole reason.

DC: No further questions.

#### RECROSS-EXAMINATION

Questions by the prosecution:

Q. Did Larry Johnson have any particular talent in playing or coaching soccer?

A. No. I asked Frank Grantz though, he was pretty much an athlete.

Q. I thought you said in response to Mr. Hochberg's question that you occasionally asked Larry Johnson and Frank Grantz to assist.

A. Well he included both of them, I don't know why he included both of them, maybe—I remember in the bowling league, Mr. Johnson helped keep score a couple of times for the kids.

TC: No further questions.

MJ: Thank you Petty Officer Solorio you may resume your seat at counsel table.

[The accused returned to his seat.]

Toni Solorio, civilian, was called as a witness for the defense, was sworn, and testified as follows:

#### DIRECT EXAMINATION

Questions by the prosecution:

Q. Please state your full name, place of residence and your employment.

A. My name is Toni Lee Solorio, I am a house wife presently, we live at 877 apartment 314, Governors Island.

TC: Thank you, your witness.

Questions by the defense:

Q. Mrs. Solorio are you acquainted with YN2 Frank Grantz and his family and CWO Larry Johnson and his family?

A. Yes.

Q. How did you first become acquainted with the Grantz family?

A. I met Kathy, the wife, at work, we were both working at the forest service maybe in '81 and that was through working.

Q. Did your relationship with the Grantz family develop after meeting at work?

A. Later, yes.

Q. How did that develop? What involvements did you have with them that caused the relationship to develop?

A. Our children were in bowling and basketball together and my husband played basketball with Frank and we just became friends.

Q. Did your children ever play at the Grantz's?

A. Yes.

Q. Did Jennifer Grantz ever play at your house?

A. Yes.

Q. Did the fact that Frank Grantz was a member of the United States Coast Guard have any impact in your friendship with the Grantz family at all?

A. No.

Q. Did you socialize with Kathy Grantz at work at all?

A. Yes.

Q. And then after work also?

A. Sometimes, yes.

[109] Q. Did you regularly attend the Saturday morning youth bowling league?

A. Yes.

Q. Did you also see Kathy Grantz at that bowling league?

A. Yes.

Q. How did you come in acquaintance with the Johnson family?

A. They lived next door to us and we really didn't see them very much for the first year or so that we lived there because I was working quite a bit and she stayed home and did day care. We did get to be very close friends later on, about the last couple of years.

Q. What caused you to get very close friends?

A. We had bowling with the children, their kids were involved with bowling like our kids were and other sport activities.

Q. What other sport activities?

A. Soccer and it could have been basketball, I am not sure.

Q. Did you become acquainted or more friendly with Mrs. Johnson as a result that you both ran day care centers together?

A. Yes, very much so. She helped me get stated in my day care.

Q. Were there other families in the neighborhood that you became friendly with?

A. Yes.

Q. Where those be civilian or military?

A. Civilian.

Q. Was the fact that Jo Ann Johnson was married to a active duty Coast Guard member, did that effect your friendship with Jo Ann Johnson at all?

A. No.

Q. Did that effect your family's friendship with the Johnson's at all?

A. No.

TC: Your honor, I'll object to further questioning along this line on the grounds of lack of relevance to the jurisdiction motion. Mrs. Solorio's motivation to friendship is not relevant at all to jurisdiction.

DC: The defense contends on the contrary your honor, that the entire family social off base relationship was the basis of [110] the friendships with the three families and that any relationship they had began off base with off base activities and off base social events and had no connection with the military at all. The connection between the two families developed as a result of the relationship of Mrs. Solorio and Mrs. Johnson and Mrs. Solorio and Mrs. Grantz, Brian and Emanuel Solorio and the Grantz and Johnson children.

MJ: The objection is overruled.

Q. Did you socialize with the Johnson's?

A. Yes.

Q. In what manner did you socialize with the Johnson's?

A. I went to church with them on Sundays sometimes and we participated in the children's activities and also we used to play cards with them in the evenings.

Q. Were any of those church events or card parties or what ever, were they ever Coast Guard sponsored?

A. No.

Q. Did it have any relationship to the Coast Guard what so ever?

A. No.

Q. Did you ever socialize with any other civilian friends?

A. Yes.

Q. Similar manner?

A. Yes.

Q. Did the fact that your husband, YN2 Grantz and CWO Johnson were members of the Coast Guard effect your family's relationships in any way?

A. No.

DC: No further questions.

#### CROSS-EXAMINATION

Q. Mrs. Solorio you are married to YN1 Richard Solorio, are you not?

A. Yes.

Q. Your testimony dealt with events on direct of events in Juneau while you were up there?

A. Yes.



[111] Q. About how many Coast Guard people lived in your immediate neighborhood?

A. Maybe four or five.

Q. How do you define your immediate neighborhood in terms of blocks?

A. Just how far you can see I guess.

Q. Did you know the Haigh's?

A. Yes.

Q. Did their children play over at your house?

A. Sometimes.

Q. Did your children play over at their house?

A. Yes.

Q. I believe there is another Coast Guard family right behind the Haigh's.

A. I didn't know them.

Q. How many moves have you made with the Coast Guard when your husband got transferred since you have been married?

A. Eleven.

Q. Do you keep in touch with the Coast Guard families that you met at previous duty stations?

A. Sometimes, yes. I also keep in touch with civilians.

Q. For instance, have you keep in touch with the Johnson's since they have been transferred and you have been transferred?

A. Yes.

Q. And the Grantz's?

A. Yes.

Q. Have you ever run into families that you have served with at other duty stations?

A. Yes.

Q. It is a small service and we run into friends in the Coast Guard later on in life.

A. Right.

Q. When your husband coached soccer, what days would that normally be, during the week or on the weekends or both?

A. Mostly weekends.

Q. Did you ever go to those practices or games?

A. Yes.

[112] Q. Did your husband ever bring Jennifer Grantz and Amber Johnson home after those practices?

A. Maybe on occasion, we were friends with them so it is not unlikely.

Q. Amber Johnson lived right next door?

A. Right.

Q. Did Jennifer Grantz or Amber Johnson come over to play at your house frequently?

A. Amber use to come over maybe once a week somewhere around there.

Q. How about Jennifer.

A. Jennifer not as quite as often.

Q. Did these visits encompass most or all of your period of time in Juneau, Alaska?

A. No.

TC: I don't have any further questions.

#### REDIRECT EXAMINATION

Questions by the defense:

Q. Do you know the Harrara's?

A. Yes.

Q. Are they military or civilian?

A. Civilian.

TC: Your honor, I believe we are going beyond the scope of cross at this point. We seem to be going into matters which are properly brought out in direct examination.

DC: Your honor, the government asked if Mrs. Solorio kept in touch with military members as she has been transferred. The defense intends to offer -

MJ: The objection is overruled.

Q. Are the Harrara's military or civilian?

A. Civilian, they are ex-military people.

Q. And the Stevenson's?

A. They are civilian.

Q. And the Macky's?

A. Civilian.

[113] Q. Do you keep in touch with those people also?

A. Yes.

Q. Whereever you have been transferred?

A. Yes.

Q. Would the relationships with the Johnson's have been just as close if they were civilians?

A. Yes.

DC: No further questions.

TC: No questions your honor.

The witness was duly warned and withdrew from the courtroom.

DC: Your honor, the defense has no further witnesses on the jurisdictional motion.

MJ: Any further from the government?

TC: Nothing further from the government your honor.

MJ: Until nine forty-five the court will be in recess.

The Article 39(a) Session recessed at 0925 hours, 4 June 1985.

The Article 39(a) Session was called to order at 1000 hours, 4 June 1985.

MJ: Please be seated, the Article 39(a) Session will come to order.

TC: Your honor, all parties who were present when the 39(a) Session recessed are again present, no person required to be present is absent. There are no witnesses or members present.

MJ: Before proceeding to argument, I'll state that a matter that I deferred as to Appellate Exhibit IX, the letter from the State of Alaska Department of Law. I will admit for the purpose of consideration on the jurisdictional motion and in doing so recognizing that it contains a good deal of information not particularly relevant to the motion, but accepting it for the position taken by the State of Alaska as stated in the letter.

DC: Your honor, at this point then the defense would offer a Stipulation of Expected Testimony of Louis James Menendez, Esquire, the individual who signed the letter from Alaska which you have just admitted. It states that if the Coast Guard should determine that this court-martial is without jurisdiction to [114] prosecute, Alaska would reconsider its decision not to prosecute. There is no present statute of limitations problem with regard to this case.

MJ: Once again Petty Officer Solorio, do you recall my talking about stipulations and how they work?

WITNESS: Yes your honor.

MJ: Do you understand this stipulation?

WITNESS: Yes your honor.

MJ: And the contents of it?

WITNESS: Yes your honor.

MJ: Do you agree with it?

WITNESS: Yes your honor.

MJ: And you want to enter into it?

WITNESS: Yes your honor.

MJ: The stipulation is accepted and it will be marked as the Appellate Exhibit next in order.

REPORTER: It will be Appellate Exhibit XV.

MJ: Are counsel prepared to argue the motion?

TC: Yes your honor.

MJ: You may proceed.

TC: Your honor, what I propose to do, fairly briefly, is go through some of the assertions made by defense counsel, review a number of the more pertinent cases that are referred to in the government's brief, briefly go through some of the most pertinent findings of fact as they relate to particular *Relford* factors and then some closing remarks. First of all with respect to the defense counsel's brief, one of the cases that is cited there, *United States v. Moore*, dealt with a situation where a serviceman conspired to get death benefits. One of the things mentioned in that case was that the impact on the service had to do with the regulatory program and statutory programs. I mention this in relation to the matters that your honor has been asked to take judicial notice of, the Family Advocacy Program and unrestricted transfer. *Moore* stands for a more concrete example that the impact can be gauged through the framework of a statutory or [115] regulatory policy. Also cited on the first page - second page of the defense counsel's brief, *United States v. Hedlund*, dealt with a case where a Marine who was AWOL was beaten up. There we had a case where the victim was a service person, however, they did not know that the victim was a service person. In contrast in this case the testimony of all the witnesses that the victims were military dependents, persons who accompany military members through out their tours. The vic-



tims were known by the accused to be the dependents of service members. The victims themselves knew that the accused was in the Coast Guard. Defense counsel reviews the *Relford* factors and, of course, in each instance asserts that there is no implication of any *Relford* factor in this case. I believe the testimony and the expected testimony show that there are *Relford* factors involved, there are impacts involved, the only question is are they sufficient? For instance in item 2, "The crime's commission away from base". It is accepted that this crime took place away from base, however, the line between a base and off base is not a bright line which establishes or forecloses military jurisdiction. Many cases represent that point. On page three, *Relford* item six, defense counsel asserts that there is no connection between the defendant military duties and the crime. Here he knew that the victims —

MJ: You say there is not a bright line between away from base and off base, the operative language going back to *O'Callahan* is "at or near". How does that relate here?

TC: Your honor, *O'Callahan* is decreasingly cited, both by our highest military court and by members. They tend to move towards the *Schlesinger* quotation. While acknowledging that *O'Callahan* is good law, they move towards *Relford* which is the balancing approach of all factors and towards *Schlesinger* which makes them very prominently consider the post-offense impacts of a particular crime. In fact I'll point out that *Relford* itself, although it was on base, obviously found it necessary to go through this balancing act because the victims in that case were persons who accompanied military members, the sister of military member and the wife of a military member. The Supreme Court felt it necessary to balance, even in that case even though it was on base, so it is clear that the Supreme Court does not leave the matter with off-base, on-base distinction. The fact that an offense occurs off base immediately creates no military jurisdiction. Indeed, *Relford* would imply that even an offense on base may not have military jurisdiction. I am starting to discuss *Relford* item six which is on page three of the defense brief, "The absence of any connection between the defendant's military duties and crime". First of all, there is the obvious effect on

the other yeoman involved. These are people who Petty Officer Solorio worked with at the district and military relationships have been destroyed or severely compromised by this [116] crime. This is not just a distant effect, it is one that is obvious given the known status of the victim and the known status of the accused and the known status of the victim's parents. In addition, there is an element of, if not flouting of military authority, of a significant effect on military authority for the same reasons. Item eight, "The availability of civilian courts in which the case can be prosecuted". The message from the Seventeenth district indicates that civilian courts are available for these types of crime. The Seventeenth district message does not indicate whether the accused happened to be in that jurisdiction or whether the victims happened to be in the jurisdiction. I believe in one case it indicates that it may have been a dependent who is a victim of a crime, a intra-family crime, and the other case we don't know who the victim is. In this case we know that the defendant and all the victims have been transferred away from the Jurisdiction of Alaska by the Coast Guard for policy reasons independent of the offense. The Coast Guard has removed these people from the jurisdiction of Alaska and has made it more difficult for Alaska to investigate or to prosecute. We have had testimony that Alaska has taken no efforts to interview any of the military members involved or the military dependent victims involved in the charges preferred against Petty Officer Solorio. However, Alaska has reported that they are inquiring about potential civilian victims. Alaska is more interested when there are civilian victims perhaps still living in Alaska then they would be if the victims have departed and are all related to the Coast Guard. There is a threat to a military post, *Relford* item ten, page four of defense counsel's brief. The effects that are felt by the service member father of the dependent victim are a threat to the post itself. These effects are carried around with the military member whether he is on duty or off duty. Indeed, cases that I cite in governments brief indicate that the line between on duty and off duty is very blurred in this day of increased military readiness, the line between peace time and war time can



change at any time. I believe that is *Lockwood*. There is a continuous threat to the military post, both to the affected member and because of our transfer policy in the Coast Guard, the threat to any post the the accused may find himself on. Doctor Caprio testified that the intent, in psychological terms—the love object or the object of affection, is very difficult to change. In the case of pedophilia, we have charged against the defendant acts of child molestation, both in Alaska off-base and in Governors Island on-base. The charges allege a course of conduct which illustrate Doctor Caprio's psychological principle that the intent or the love object, the object of affection, tends to be carried around and creates a threat to the military post.

DC: Your honor, I am going to object to this line of argument since Doctor Caprio stated that there is no way of telling at this point if YN1 Solorio was a pedophile.

[117] MJ: I have heard the evidence, objection overruled.

TC: The other elements, the offenses are traditionally prosecuted in civilian courts, I have already discussed that in relation to Alaska's deferral or waiving of prosecution in favor of Coast Guard prosecution. One of the additional considerations in *Relford* is the commanding officer's responsibility for maintenance of order and discipline. The Seventeenth Coast Guard District is concerned about a perception that military member may not be subject to either civilian or military jurisdiction in these kinds of offenses and that there may be a feeling that these things that go unreported are not criminal. This reflects a perception of the command at the Seventeenth District that offenses by Coast Guard personnel affect the service's reputation and personnel must be reminded that it impacts on good order and discipline within the service itself. I believe you'll find language in that message which leaves that clear intent. Two of the factors that are not very specifically addressed by *Relford* illustrate the principle that the *Relford* are illustrative but they are not all inclusive. The reputation of the service has been emphasized more and more in cases like *Lockwood*. It receives just a passing mention in *Relford* it self. In this area of volunteer service the reputation of the service is extremely important for retention

and for recruitment. Another one that is mentioned is military effectiveness, readiness. It seems to be a very obvious factor but you'll find that *Relford* puts it down in a consideration and it has about a one word mention, "effectiveness". Here we have testimony by the parent-victims, the military member victims, that their military effectiveness has been affected by these crimes. We have psychiatric testimony that those effects are acknowledged and are reasonable psychological impacts on the parent victim. Indeed *United States v. Short* cited by both the defense and the government involves a case where the victim was hospitalized and thus was unable to perform his military duties. That case also emphasized the impact on morale, reputation and integrity of the installation.

In the government's brief I'll emphasize once again that although we do have an off base offenses here, the language in *Lockwood* concerning—making the point that few military enclaves are self-sufficient and usually the service members assigned to a post and their dependents must rely on persons in the surrounding communities for various types of support such as housing, credit, and recreation. It almost seems as if that language is tailored made for offenses occurring in Juneau and the effect on the reputation of the service and the effect of each individual member of that service when the reputation is damaged. In the government brief a good portion of that is given over to the [118] trend of thought that has been evident in drug cases, and in sex offenses, in applying *O'Callaghan* and *Relford*. In these areas of both drug and sex offenses the immediate reaction to *O'Callaghan* was a strict interpretation. Very little balancing. Off base—no jurisdiction, on base—jurisdiction. In most of the cases cited by defense you'll note were decided in 1969 the same year as *O'Callaghan*. In *Trottier* that initial knee-jerk reaction to *O'Callaghan* was finally reversed. The drug cases that have been decided since *Trottier* emphasize the the post offense effects on the reputation and the effectiveness of the service. They seem to see the perpetrator as a lawless individual within the military society who is a threat to the effectiveness. It is not so much the use of drugs as a violation of regulations and law, but they focus on the post-offense effects of that

violation. *Trottier* is an illustration of the used *Schlesinger v. Councilman*, more so than *O'Callaghan*. The government admits that this case may be an unusual case. Here we don't have a victim who is in the service, the victim is one who customarily accompanies a serviceman, a camp follower. *Lockwood*, *Trottier*, and *Relford* illustrate that some of these old concepts need to be reexamined in light of existing experience. Camp followers are now daughters, sisters, wives. *Relford* is an example of that. *Relford* itself acknowledges that the fact that the sister was involved and the wife was involved is important. *United States v. Wierzba*, 11 MJ 742 is one of the primary cases that the government would ask your honor to examine. Even though that is pre-*Lockwood* it uses a *Lockwood* type analysis and found as supporting jurisdiction, violation of personal security of families, disgracing the public image of the Air Force and the military's interest in prosecuting the off-base portion of the charged offenses as exceeding the civilian community's interest in prosecuting just those off-base offenses. *Lockwood* alludes to pendant jurisdiction and *Wierzba* may be a particular application to that type of pendant jurisdiction, which alone, will not support jurisdiction. Because of the military's practice and interest of charging all related offenses in one court-martial, it does create a distinct military interest when there are related or course of conduct charges, charges of all one type, some of which occur on-base and some of which occur off-base. This distinct military interest finds some specifics in the need for military witnesses in both forums; the presence of the accused in both forum. In this case the trauma of child witnesses in two trials rather than one. Pendant jurisdiction receives its final justification in the due process that is accorded to military members in our system of justice. The two unreported cases naming Marine Corps that have been given to both defense counsel and your honor illustrate these points as well. The proposed findings that the government has submitted, in all pertinent factual assertions have been supported by the testimony or the stipulations of expected testimony or the stipulations of fact that are before this court. In particular, the rationale [119] given by states attorney for the

decision not to prosecute illustrates some of the distinct military interests that I have already referred to. The state of Alaska is not interested in the military relationships between the accused and the fathers of the victim. The State of Alaska's interest and ability has been diminished by the Coast Guard's policy to transfer. The Coast Guard interest in seeing that justice is done should be increased by a similar amount. It is the Coast Guard that has diminished Alaska's capability. It is the Coast Guard whose distinct military interest increases by a like amount. I will review the defense proposed findings of fact just to show areas of agreement your honor. The government does not disagree that Petty Officer Solorio was and is now a member of the United States Coast Guard, Amber Johnson is a civilian dependent, Jennifer Grantz is a civilian dependent. Where the government does disagree most strongly is the assertion that the integrity and security of any military base has never been violated at any time. The government disagrees very strongly that there was no connection between the accused's military duties and the alleged offenses. The government disagrees that the relationship between the accused and the alleged victims developed as a result of off base civilian activities. Because of the character of the community of Juneau and the Coast Guard's reputation in Juneau, the relationship between the accused and the alleged victims—for the purpose of this argument I am going to include the parent victims and the parent victims in the term victim. The relationships are mixed. Part of them result as a result of a military association and military working relationship and part of it results from off base "civilian activities". A friendship, like society, is a seamless web, it is difficult to separate those strands, but it is clear that an element of the friendship and the access to the dependent victims was the accused's military relationship. The government is not emphasizing the pre-offense context, contact between the accused and the victims. There are some, Jennifer Grantz met the accused at his duty station many times before the offense. Amber Johnson met him when she went for ID cards, perhaps for other reasons. She knew he was in the military. The primary basis for jurisdiction in this case are the post-



offense effects on the service and on the military member and on the victim. In summary, it is clear from the testimony that this course of conduct that includes both off-base offenses and on-base offenses is, in a sense, all arising out of the same criminal "design", that design being the object of affection that Doctor Caprio testified to and they create a threat to this post as well as the base, in the Seventeenth District. The impact on the military members morale and effectiveness is substantial and indeed it would be the same impact whether on-base or off-base. The impact on the Coast Guard's reputation of an offense such as this would be the same on-base or off-base. Much has been made of questions by the defense that if the perpetrator were a civilian, that the same [120] impacts would be felt by Amber Johnson, Jennifer Grantz and their parents. That is true and that were the case we wouldn't be here in a military court because we would not have personal jurisdiction. The point is that these impacts have been caused by a military member. So all of those questions about impacts being the same personally on these victims if the perpetrator had been civilian are just meaningless. The point is that these impacts were caused by a military member on military interests and persons associated with the military. All of these factors lead to a conclusion that the Coast Guard has a distinctly greater interest than the civilian courts in prosecuting all of these alleged offenses. The key is in *Schlesinger v. Counselman*. The issue turns in major part on gauging the impact of an offense on military discipline and effectiveness on determining whether military interest in deterring the offense is distinct from and greater than, and here we have both a distinction and a greater interest than that of civilian society and whether the distinct military interest can be vindicated adequately in civilian courts. State of Alaska has admitted that they would not consider many of these distinct military interest in a case such as this. These distinct military interest create court-martial jurisdiction. There is subject matter jurisdiction over the Alaskan offenses. That is all the government has your honor.

MJ: Thank you.

DC: Your honor, the government has alleged a series of crimes against two military dependents, civilian military de-

pendents. The allegations include crimes that grew out of a relationship, a relationship with two families and the basis for that relationship, as testified to by all the witness here concerned, was civilian non-Coast Guard related functions. Civilian outside activities. Geographical relationships. Those relationships between the families would never have developed notwithstanding the fact that Petty Officer Solorio, CWO Johnson, YN2 Grantz were members of the same organization, worked in the same place. Those relationships would not have developed in the manner they developed, if at all, outside the fact that all the families had children of similar ages and those children were playmates. I note that in the stipulation of expected testimony of Amber Johnson and Jennifer Grantz the relationship flourished because the children played together and without the children playing together the relationship would have been much different. The government has claimed that there has been a dramatic impact in the effectiveness of the military parent of the victims. The government has alleged that the military parent is also a victim. In my questioning of Doctor Caprio I focused some what on similar effects of a car accident. Now in civil tort law it is accepted that if a parent, in many states, witnesses a car accident that parent has received an injury. But if the parent is removed from [121] the car accident and just learns of it at a later point, and that later point need not be too remote, the parent no longer has a cause of action. The situation is analagous here, the parent is a victim because of his or her own subject feelings or concerns. But being a victim is not being a direct victim. The impact upon the parent is not clear and measurable and it is certainly not direct and substantiated, excuse me not direct, it may be substantiated. Just like in civil tort law that parent can no longer be considered a victim. As I noted in my brief in *Lockwood* forged the name of another service member and the forgery could cause that service member direct and substantial harm, because that service member could be called into court and forced to defend himself. It is not the case in the case before us. There has been much testimony about the reputation of the service. Yes the Coast Guard does have a good reputation, hopefully it



has a good reputation where ever it goes. In Juneau it has a very good reputation, it is a small community, 20,000 individuals live and work there. But there hasn't been a bit of testimony about the effect on the reputation. It might be damaged if the crime became known at the time of the commission while in Juneau, but there has been no effect on Juneau. There has been no effect on Governors Island as testified to by CWO2 DeMarchi who lives on Governors Island and Chief Truby who lives on Governors Island was not even aware of any effect on the reputation. The individuals who testified about reputation diminishing respect to the uniform all testified that they loved their uniform, that they loved the Coast Guard, they are proud to wear that uniform and the fact that these crimes may have occurred has not and did not diminish their respect and love for the Coast Guard. Military relationships have been alleged to have been damaged. Mr. Johnson and Petty Officer Grantz both testified that those military relationships would be damaged in the same way if there was a murderer of a rapist or a robber that they had to work with. Military relationships are damaged by criminals, but that in itself is not sufficient to confer a court-martial to hear and try a case. There is an interest in trying all cases in the same form and this is very true. But, from Special Agent Smith's own testimony it seems fairly obvious that all the cases will not be tried in the form and can not be tried in the same forum because Alaska is investigating further alleged violations or alleged offenses allegedly committed by Petty Officer Solorio. In that case Petty Officer Solorio would still be forced, if there was subject matter jurisdiction of these offenses, to defend himself in this court and defend himself in Alaska. The interest of judicial economy will not be served in either case. It is either a question of cases here and cases there, possibly four here and two there or two here and four there. The interest of judicial economy cannot be served by conferring upon this court subject matter jurisdiction. There has been a continuing evolution of the concept of subject matter jurisdiction and the concept of service connection. *United [122] States v. Trottier* and *Murry v. Haldeman* recognized that evolution. It also recog-

nized the impacts. *Trottier* and *Murry v. Haldeman* both recognized that if an individual is accused and found guilty of—accused of using drugs it may be tried in a court-martial even though those drug offenses occurred off base, except in a case where the member has been on extended leave away from a military installation. *Trottier* said extended leave might be 30 days and that is where it becomes remote. In this case we are talking about one to four years and it is not clear when these offenses occurred. In a period of one to four years prior to this time that these offenses have occurred. The impact is to remote. The impact upon the service members, their feelings, is indirect. It is insufficient to confer upon this court subject matter jurisdiction. *United States v. Lockwood* and the other cases cited in the defense brief look at a variety of factors, but the variety of factors they look at are separate factors. *Lockwood* did not say—did not focus upon the effect, reputation, morale, integrity and discipline, it said that it can not be ignored. It is one factor. In this case we have that one factor but it indirectly effects reputation, morale, discipline, etc. *Lockwood* involved the larceny. In *Lockwood* credit was a concern because a service member abused that position of trust that all individuals hold, all respected individuals, directly related to the credit issue. It is not the case here. What we have here is allegations of crimes committed by civilians off base and were not discovered or reported until long after the offenses took place. The effect is not direct. In *Lockwood* the effect was direct, it was immediate. *Trottier* also focused on the expertise of military courts with regard to drug offenses. It also focused on the fact that civilian courts are not as concerned about drug offenses, minor drug offenses—use of drugs as compared to distribution, as the military. The military has a very special interest in drug offenses. Alaska on the other hand in all civil jurisdictions have a very real interest in prosecuting sex offenses, sex offenses committed upon residence in their community or state. The government has made a point of arguing the course of conduct. The defense contends that the government is wrong as far as course of conduct. First of all, this isn't the type of course of conduct that would satisfy the multiplicity

requirement. This isn't a course of conduct with regard to each offense. These are separate offenses, all separately alleged, all separately charged, all occurring in different ways, no showing of a course of conduct and it is not a course of conduct that began on base and continued off base, it is a course of conduct that is alleged to have occurred off base first and at a later date there are crimes alleged to have been committed on base. *United States v. Shockley* looked at this issue very closely and said the off base offenses were not service connected, but the on base offenses were. The defense contends that if the on base offenses occurred first and then the off base offenses occurred, that would have been the course of conduct [123] that began on base and continued and would confer on a court subject matter jurisdiction. This case is clearly on point with *Shockley*. In *Shockley*, *McGonigal*, and *Henderson*, those three cases dealt with – were directly on to this case and stated clearly that when you have an offense committed off base, even against military dependents, that offense is not service connected without more, without a showing of more. That is where *Wierzba* is very clear. In *Wierzba* there were six factors that the court looked at. The accused used his status as a military member. He went to Civil Air Patrol meetings in his uniform. He was allowed to participate in Civil Air Patrol meetings primarily because he was a member of the Air Force. Petty Officer Solorio did not participate in soccer and bowling and the other civilian activities that he participated in because he was a Coast Guard member. He participated because he was a parent. In *Wierzba* the accused his on base housing and erotic materials in that on base housing as part and parcel to the scheme, and that is very important. Pendent jurisdiction does not apply here. An essential element to pendent jurisdiction is the common nucleus of operative fact. There is no common nucleus of operative fact with regard to the cases in Alaska and the cases on Governors Island. *Wierzba* victimized Air Force military dependents. Where did those dependents live? They lived on base –

MJ: Let me back you up to your pendent jurisdiction comment. I hear what you are saying as far as no common nucleus of operative fact but should the concept apply?

DC: In this case or in the military in general?

MJ: Is it a consideration?

DC: The defense contends that it may be a consideration. It may be a consideration if there is that common link. for instance, two alleged victims on Governors Island, Jennifer Scott and Malissa Carney, that arises from the common nucleus of operative fact. The offenses were alleged to have been committed at a party on January 4th and January 5th. That is the common nucleus of operative fact. Pendent jurisdiction, sure, is a consideration. Judicial economy is a consideration but, it is not an over-riding consideration. The over-riding consideration is the accused's right to trial by jury, to Grand Jury indictment and also to a unanimous verdict. Although the military has progressed from the time of *O'Callaghan* to where there are more procedural protections for an accused, there are still some essential Constitutional rights that are not provided and should not be provided to military accused who appear in court-martial who properly appear before military court-martial. As far as pendant jurisdiction, yes it is a consideration if the concept applies, but in this case the concept does not apply as was stated in *Brannon* the phrase was just a collection of disparate [124] acts solely linked by the general nature of the allegations. In *Wierzba* since the course of conduct began on base by picking up dependents from their on base housing, *Wierzba* did violate the personal security of Air Force families. That was a direct clear measurable impact, clear and measurable violation of a military base. A commanding officer does have the responsibility as clearly shown by CO of Support Center, he is the mayor of Governors Island. He has responsibility for all the families, military and civilian dependents, that live on his base. When military members live on the economy off a military base, a commander's interest is greatly if not completely diminished. Finally in *Wierzba*, *Wierzba* disgraced the public image of both United States Air Force and Civil Air Patrol. He did this by wearing his uniform and committing crimes while he was in uniform. *Wierzba* did not just look at the military dependent status of the victims and say okay we have service connection, it looked at other significant factors. In



every case that has conferred subject matter jurisdiction on the basis of service connection on court-martials there have been other significant direct impacts, direct concerns that apply. Not the case here. It was not the sole factor, the disgracing of the public image in *Wierzba*, it was one of many considerations. In this case we had the dependent status of the victim and from that the other considerations that the government sets forth are boot strapped from that dependency status. The effect on morale, boot strapped from the dependency status. The fact that Jennifer Grantz and Amber Johnson visited the accused on rare occasions, once in a while, while at work, incidental to the reason they were there, to visit their father or to have an ID card picture taken. When no offenses occurred on base at that time and that meeting was not part and partial of any of the offenses charged cannot be used as a basis to establish service connection. Going back to *Lockwood*, *Lockwood* initiated a crime on base. There were direct service member victims, an individual had his wallet stolen. The course of conduct continued. Pendent jurisdiction may have applied there, it was considered there because that was all arising out of a common nucleus. The offenses in Alaska and the offenses in New York are wholly separate so pendent jurisdiction does not apply. The Seventeenth district message makes it clear that Alaskan courts are ready and available to prosecute cases like this. Again Special Agent Smith's testimony that they are actively pursuing other allegations, other potential victims, indicates that they are available and that Petty Officer Solorio may be forced to have his cases heard in two forums. Judicial economy won't be served. The commanding officer recognized what the responsibility was, what the responsibility of military members are, but it is a responsibility of all citizens. It is their responsibility not commit crimes. In *Shockley*, *McGonigal*, *Henderson* and also in *Rappaport*, cases clearly establishing that there was no service connection to try those offenses, there were even more factors than are present here that might have [125] tended to indicate service connection. Offenses were committed in the other service member's home, not the accused, but the other service member's. In

*Rappaport* the victim was at the time an Air Force officer. Undoubtedly their meeting occurred on base, but the court made clear in analyzing the *O'Callaghan* and the *Relford* factors, not withstanding government's contention, that *O'Callaghan* and *Relford* have not been previously cited. *Rappaport* relied solely on *O'Callaghan* and *Relford* and found no service connection. The government contends that the effect on the dependents' fathers is a threat to military post. It is not a threat to a military post, it is an effect on a military member. The defense concedes that it is an effect on a military member but the military member is not the victim. A remote victim maybe, but the victims. That effect would have been the same had it been a civilian perpetrator. The importance of that is that these offenses are not clearly those having military significance. The effects would have been the same on the parents. The time away from their desk, their concern for their daughters would have been the same and those parents right and interest can be adequately vindicated in any form. The military forum is not necessary to vindicate the military interest. *Scheslinger v. Councilman* makes it clear that direct and substantial impact on the military, significant impacts within the enclave. There are no significant impacts within the enclave. The government did provide the court and myself with copies of *Mattao* and *Heuit*, two Navy-Marine Corps CMR cases. In *Mattao* the court based its decision on deferring jurisdiction over the off base sex offense on two significant facts; 1) That the pendent jurisdiction issue applied, it was a common nucleus of operative fact and not only that, the drug offense were inrestrictably linked with the sex offenses. Since the drug offenses were clearly within subject matter jurisdiction of the court-martial, the sex offenses could also be tried. In *Heuit* the court found, and the findings in the government brief indicate this although the discussion does not clearly indicate it, that there was a sufficient on base connection. The initial contact, not an incidental contact, but the initial contact between the accused and the alleged victim occurred on base. There was continued contact on base between the accused and the alleged victims and the families. That is not the case in the case before us. There is no indica-



tion from the testimony we have heard in this 39(a) Session that any of the offenses occurred based on the trust placed in Petty Officer Solorio because he was a service man. What ever trust there was was based on off-base civilian-generated friendship relationships. The military status of the accused is just not involved. Once there was the initial contacts on base, the continued meeting on base, the course of conduct continued off base. Again pendent jurisdiction may apply or that concept may apply because of that continuing course of conduct as status previously. What ever course of conduct there was is a reverse course of conduct. The [126] defense would agree in *Shockley* if the on base offenses occurred first, the off base offenses very well, since it was the same victim, continuing course of conduct, may very well have been service connected and within court-martial jurisdiction. Since the initial contacts knew what occurred on base, the integrity of the military instillation was threatened. But that is direct, not as the government would argue, that it affects the parents so there is that threat. It was a direct effect, a direct threat to the military instillation. You would also have found that the interest of the military is distinct from and greater than the interest of the state. In this case the interests of the military is not distinct from the the state's, the interest are identical. The difference is, the state clearly had jurisdiction to try the offenses. The state clearly has jurisdiction to try the other alleged offense in which they are investigating, but this court-martial does not have subject matter jurisdiction over offenses allegedly committed against civilian dependents off base with no other military connection. The government sought to make the point of the fact that the Juneau area is inhabited by many Coast Guard residents. There is also testimony that there is no way in and no way out of Juneau except by air or by boat. Obviously any military member who lives or works in the Seventeenth district has to live in the Juneau area. There are 200 or 250 military members on base in the Seventeenth District. That is a ratio of one to 1,000 military to civilian. Again, in, I believe it was *Henderson*, the crimes were committed in Colorado Springs, that is clearly a military community. More so probably than Juneau is. Again, *Hender-*

*son* was not service connected because there was insufficient contact with a military base. Insufficient impact, in this case crimes being reported long after they occurred, that impact has to be remote. The testimony of Mr. Johnson and YN2 Grantz was that they no longer trust males with their daughters. The testimony of Chief Truby, he is more cautious of his daughter now not just because of what he has heard about this case, but the fact that child sex abuse cases are becoming more and more reported. They are making the news. The fact that the perpetrator is a male is a cause for concern of all citizens, not just military members, but of all citizens. The government also made a point of posing the fact that military personnel have been involved in the investigation of the case and to a small extent the counseling of the individuals. If dedication of military personnel to a case was sufficient to establish service connection, the military could establish connection over every offense committed by a service member simply by dedicating personnel to that case. That would be a threat to discipline in the government's view because it takes time away from those individual's other duties and responsibilities. The government, if that was the case, could generate service connection in each case and make the service connection requirement a nullity. Mere incantation of the words course of conduct, morale, discipline, greater military [127] interest is simply an assertion without substance. In this case the offense allegedly committed by YN1 Solorio off base fall clearly within the historic principle as set forth in *Winthrop* and as cited in my brief that crime committed upon or against civilians not at or near a military camp not in violation of any military duty are in general not to be regarded as in the description of the UCMJ, it is a general article but there is no differentiation between Article 134 and other articles of the UCMJ, and are to be treated as civil rather than military offenses. In this case the Alaskan offenses are clearly civil and outside court-martial jurisdiction. Thank you your honor.

TC: Response to just a few points your honor.

MJ: Briefly.

TC: With respect to the assertion that the parents are indirect victims, to cite just an example *United States v. Ross* cited in both government and defense counsel briefs was a simple destruction of a civilian owned pay telephone. The offense affected the morale and well being of fellow servicemen for whose benefit the telephone had been installed. Simple case and indirect victims, but that is where the service connection was, the indirect victims. Many of the drug cases in that there is an effect on morale and reputation of the service. Certainly the effect on the individual serviceman's morale and their own effectiveness is far more directly effected in this case than in any of the drug cases. I said the government relies primarily on the post-offense effects of this particular offense and primarily on the effect on the parents and the camp followers, the children or dependents. In addition we rely on the distinct military interest because of the fact that all of the persons involved in these charges are related to the military, whereas whatever interest Alaska might have they involve children victims still in Alaska. As defense counsel pointed out there are so few contacts that initiated these friendships that are directly related to the service. But Petty Officer Solorio said he did not know Frank Grantz until he played on the Coast Guard sponsored league and after that he met Jennifer. I don't want to be into an absurd argument, but for the fact that both the Johnson's and the Solorio's were put in the same locale by the Coast Guard, they would not have been neighbors. We can keep going back and back and back but that just illustrates my point that the origins of the relationship between Petty Officer Solorio and Amber Johnson in this example is a seamless web. You can't get to the beginning of it and you can't get to the end of it. The point is there are military relationships involved and there are military effects involved. The government concedes it is not the sole involvement, it is not the sole factor. All you need is one *Relford* or similar factor to find jurisdiction if that factor is significant enough and creates a distinct military interest. In this case there are many of those factors involved. [128] MJ: During your argument, not because it was related thereto but because I was shuffling papers, it occurred to me

that the government letter initiating the or inquiring and resulting in the response which I've now admitted which was provided to me for *in camera* examination should be sealed in an envelope and the envelope marked as an Appellate Exhibit and attached to the record. I will accept this copy for that purpose.

TC: Your honor, obviously the original is with the State of Alaska.

MJ: The rules particularly allow a copy in that regard. Let's take a short recess following which I will be prepared to rule on the motion.

The Article 39(a) Session recessed at 1110 hours, 4 June 1985.

[129] The 39(a) Session was called to order at 1120 hours, 4 June 1985.

MJ: This Article 39(a) Session will come to order, please be seated.

TC: Your honor, all parties who were present when the Article 39(a) Session last recessed are again present, no party required to be present is absent, there are no witnesses or members present.

MJ: I am going to grant the defense motion to dismiss the Alaska offenses. I'll make certain comments in support of that ruling. First I will compliment counsel for their excellent briefs and arguments in laying out the issues on that matter.

I. The considerations; Constitutional; Supreme Court decisions in *O'Callaghan*, *Relford*, *Sehlesinger*, the provisions Rule for Court Martial 203 and its discussion and its analysis; The Court of Military Appeals decisions were all cited. Certainly the earlier cases, very closely on point, as Government pointed out many of them dated 1969 and presumably backlogged on the docket at the time of the *O'Callaghan* decision, up to and through *Lockwood* and even more recently *Johnson* and other cases and numerous Court of Military Review cases that were cited and argued. Pendant jurisdiction was found to be not applicable to establish jurisdiction in this case though I have considered it, especially in light of *Lockwood*. I have applied a preponderance of the evidence standard with the Government having the burden of persuasion.



II. In simple terms my finding is that the Government hasn't met its burden. I certainly recognize a continuing evolution of the concept of subject matter jurisdiction in military jurisprudence. Nevertheless, I recognize what the law is and am not necessarily applying where it may be going.

III. I adopt as essential findings of fact the stipulation of fact for the jurisdictional motion which has been entered into by the parties in this case.

With respect to the *Relford* factors:

– I find that the accused was properly absent from his unit at the time of each of the alleged offenses.

[130] – Each offense was alleged to have occurred away from any military base at the accused's residence in the civilian community.

– Each offense was alleged to have occurred in a place not under military control.

– Each offense was alleged to have occurred within the territorial limits of the United States,

– None of the offenses was alleged to have been committed during time of war and all offenses were unrelated to authority stemming from the war power.

– The accused did not use his military position to commit any of the alleged offenses, nor did he commit any of the alleged offenses while performing his military duties. In short, there was no connection between the accused's military duties and the alleged offenses.

– The victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses.

– Civilian courts are present and available to adjudicate the offenses. While the State of Alaska has presently deferred prosecution in light of this proceeding, the State has not waived prosecution, not declined to prosecute.

– Accused was not in uniform and in no way flouted military authority at the time of the alleged offenses.

– None of the alleged offenses posed a threat to any military installation. None of the alleged offenses resulted in any violation of military property.

– All of the alleged offenses are of the type traditionally prosecuted by civilian courts and are specifically of the type the Coast Guard has recently consented to have civilian courts prosecute Coast Guard members for in Alaska.

With respect to those so-called "additional *Relford* factors":

– There is no essential interest of the military in the security of person or property on post in this case.

– No issue challenge the Commander's responsibility and authority to maintain order.

– There has been no demonstrated impact of the offenses on morale, discipline, the reputation or the integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions. The impact apparent in this case, that is, on the parents and the victims themselves is no different than that which would be produced by civilian perpetrator.

[131] – There has been no evidence suggesting a potential lessened interest, concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses. To the contrary, Appellate Exhibit X suggests that civil courts in Alaska have recently produced results highly satisfactory to the military in similar cases.

– The Constitutional authority of Congress to authorize Court-Martial trials for other than purely military offenses is recognized and respected, as are the precedents of higher level courts.

– The particular geographic situation in Juneau with access restricted to sea and air is not unlike that of Hawaii at the time of the offense in *O'Callaghan*, and the population of the Coast Guard in Juneau in relation to the population at large did not create a relationship of a pseudo-military camp or installation. The fortuitous selection of Coast Guard member's housing in relative proximity to one another in the Mendenall Valley likewise did not create any relationship between civilians and the military, calling for the exercise of military jurisdiction for the offenses allegedly committed there. Here we do not have a case of inability to distinguish the military from the non-military area of a post or between the accused's on duty versus off-duty time while on post. These alleged offenses are off duty and off post.



-The historical fact that Court-Martial jurisdiction has been exercised over offenses which victimized the persons of someone associated with the military is recognized, as is the fact that *O'Callaghan* and other precedents did not intend to limit Courts-Martial to purely military offenses.

The offenses charged are not purely military offenses. There are a *de minimum* military relationship between the accused and the military fathers of the victims. Those relationships were founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships. There has been no showing of diminished morale, discipline, or effectiveness within the military community in Juneau, Alaska. As to the effect of the alleged incidents toward the Coast Guard within the civilian community, there has been speculation by military personnel, but little more. No unfavorable publicity in the Juneau Empire or otherwise has been introduced into evidence. There is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles. I find no adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents. The on-base association between the accused and the alleged [132] victims was minimal and did not provide the accused with the opportunity to commit the acts giving rise to the charged misconduct. The occupancy by military personnel and their families of homes in the Mendenhall Valley area of the City of Juneau, Alaska, including several military families living within close proximity to each other, did not convert that area into a military base or property otherwise under military control. the fact that several military members purchased homes in proximity to one another did not bring these offenses within the "at or near" meaning of a military base or otherwise make them on base. I acknowledge a certain amount of logic in the judicial economy argument put forth by the Government and that political or economic considerations may support exercise by this court of jurisdiction. However, those factors along with all others have not demonstrated a superior military interest in handling these

offenses. The allowances paid by the military and authorized by Congress for military personnel in Juneau, Alaska to live off base do not support the exercises of Court-Martial jurisdiction for offenses allegedly committed in the residential area of the civilian community by military members, but tend to support a conscious choice not to create military enclaves with a recognition of the authority of civil authorities to exercise jurisdiction in those areas. Again Appellate Exhibit X provides support in this regard. The impact of the alleged offenses, primarily reflected in the testimony of the service member parents of the victims, is that which might be expected of the victim of any crime of a similar nature, and while that impact may manifest itself in the work situation of those members, it does not rise to the level to compel the exercise of Court-Martial jurisdiction in these circumstances. In this regard, I note the increased caution of the parents victims may not exercise over their children, the requirements for counseling, anxiety, and time away from work for legal proceedings. These concerns would be the same whether the status of the offender were military or civilian. There has been no impact on transfer of military personnel within the meaning of the Personnel Manual provisions which have been taken judicial notice of. There have been transfers of all involved parties without restrictions.

With respect to the Coast Guard Advocacy Program, I find that Commandant Instruction 1750.3 as supported by the testimony of Captain Caprio, who was a participant in the founding of that policy specifically excludes the situation at present from its definition of child abuse. As defined in that instruction child abuse relates solely to intra-family type relationships and family there is defined not to include its broader definition of the Coast Guard family. The instruction species and in enclosure three that local laws shall govern and adopts the requirements to report in accordance with local laws and mentions that local jurisdiction shall control. Paragraph 4f states a policy to relinquish federal jurisdiction and specifies in [133] paragraph 4d that the court action of local authority shall be considered separate and distinct. Those same considerations that I have focused on from the

Family Advocacy Program instruction are reflected in the other document taken Judicial Notice of the pamphlet Charting Your Life in the Coast Guard primarily those on page 113 and thereabouts were many of the provisions of the instruction are just repeated. In light of the facts as found and in particular the reach of the Coast Guard Family Advocacy Program, I find that the Coast Guard interest in deterring these offenses is not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts.

MJ: Subject to amendment and correction at the time of authentication those should constitute the essential findings of fact on that motion. Is the defense ready to proceed with other motions?

BEFORE A GENERAL COURT-MARTIAL CONVENED  
BY THE COMMANDER, THIRD COAST GUARD  
DISTRICT, GOVERNORS ISLAND, NEW YORK

(Title omitted in printing)

Notice of Appeal by the United States

Pursuant to the provisions of Article 62, UCMJ, RCM 908 and Part 510 of the Coast Guard Military Justice Manual (MJM) (COMDTINST M5810.1 eff. date 1 April 1985), the United States, through the detailed trial counsel in the above captioned case, makes the following notifications and certifications to the Military Judge in the above-captioned case, CDR Paul M. Blayney, USCG:

Having notified the Military Judge in Article 39a session of the government's intent to seek permission to file a notice of appeal under RCM 908(b)(1);

Having received authority to file a notice of appeal from a person designated by the Secretary concerned under RCM 908(b)(2);

THEREFORE, Under the provisions of Article 62, UCMJ and RCM 908(b)(3), the United States elects to appeal a ruling of the Military Judge, CDR Paul M. Blayney, USCG. The United States will appeal the ruling of the Military Judge granting the defendant's motion to dismiss Charge I, Specifications 11-15, Charge II, Additional Charge I, Additional Charge II, Specifications 1-2 and Additional Charge III. The Military Judge ruled that the listed charges and specifications, which include off base incidents of child molestation of Coast Guard dependents in Juneau, Alaska, by YN1 Richard Solorio USCG, did not have sufficient service connection to establish Court-Martial jurisdiction over the off-base Alaskan offenses. The United States also will appeal the Military Judge's findings of essential facts in support of his ruling. Military jurisdiction over the offenses that are alleged on Governors Island, NY was not contested by the defense.

I certify that this appeal is not taken for the purposes of delay. Indeed, expedited review of the Military Judge's ruling is requested due to the adverse effects that delay has on the memories and counseling of child witnesses involved in this



case. Two of the child witnesses are undergoing intensive family counseling and their parents and counselors have represented to trial counsel that progress in therapy is difficult when "trial trauma" is ever present in the childrens' minds. I also certify that the listed charges concerning off base offenses of child molestation in Juneau, Alaska, and the evidence available to prove those offenses, are a substantial part of the government's case against the accused.

I certify that this notice of appeal was orally communicated to the Military Judge at 1500, 4 June 1985, and that this written notice has been issued and mailed to the Military Judge within the 72 hour period established by RCM 908 and the Military Judge. An uncertified copy of the Military Judge's ruling and essential findings of fact is appended to this notice.

/s/ FRANK E. COUPER

Frank E. Couper  
LCDR, USCG  
Trial Counsel

(Certificate of Service omitted in printing).



7  
No. 85-1581

Supreme Court, U.S.

FILED

JUL 90 1986

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

OCTOBER TERM, 1986

\_\_\_\_\_  
RICHARD SOLORIO, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

\_\_\_\_\_  
On Writ of Certiorari to the United States  
Court of Military Appeals

\_\_\_\_\_  
BRIEF FOR THE PETITIONER

\_\_\_\_\_  
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July 1986

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53190

### QUESTIONS PRESENTED

- I. May a court find that an offense committed off-base at a place where there is no military post or enclave is service-connected simply because of the civilian dependent status of the victim?
- II. May a court depart from its precedents setting out the constitutional limits of court-martial jurisdiction over offenses against civilian dependents and apply a more expansive interpretation in the very same case?

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## In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1581

RICHARD SOLORIO, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

On Writ of Certiorari to the United States  
Court of Military Appeals

BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The judgment and opinion of the Court of Military Appeals (Pet. App. A, pp. 1a-17a) is reported at 21 M.J. 251 (C.M.A. 1986). The judgment and opinion of the Coast Guard Court of Military Review (Pet. App. B, pp. 18a-42a) is reported at 21 M.J. 512 (C.G.C.M.R. 1985).

### JURISDICTION

The judgment and opinion of the Court of Military Appeals was entered on January 27, 1986. The petition for a writ of certiorari was filed on March 26, 1986, and was granted on June 16, 1986. The jurisdiction of this Court rests upon 28 U.S.C. § 1259 (Supp. II 1984).

(1)

## CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

The Constitution of the United States provides:

Article III, § 2, Cl. 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be . . . deprived of life, liberty, or property, without due process of law. . . ."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The Rules for Courts-Martial, Manual for Courts-Martial, United States, 1984, provide as follows:

Rule 201(b): "Requisites of court-martial jurisdiction. A court-martial always has jurisdiction to determine whether it has jurisdiction. Otherwise for a court-martial to have jurisdiction:

\* \* \*

(5) The offense must be subject to court-martial jurisdiction.

### Discussion

See R.C.M. 203. The judgment of a court-martial without jurisdiction is void and is entitled to no legal effect. . . ."

Rule 203: "Jurisdiction over the offense. To the extent permitted by the Constitution, courts-martial may try any offense under the code and, in the case of general courts-martial, the law of war."

The discussion and analysis of Rule 203, are printed at Pet. App. C, pp. 43a-48a, and Pet. App. D, pp. 49a-54a, respectively.

## STATEMENT OF THE CASE

The petitioner, an enlisted man in the Coast Guard, was charged with fourteen specifications alleging indecent liberties, lascivious acts and an indecent assault in violation of Article 134, Uniform Code of Military Justice [UCMJ],<sup>1</sup> six specifications alleging assault in violation of Article 128, UCMJ,<sup>2</sup> and one specification alleging an attempted rape in violation of Article 80, UCMJ.<sup>3</sup> J.A. 6-15. At a pre-trial hearing on June 3 and 4, 1985, petitioner made a motion to dismiss all the charges and specifications alleging assaults and the attempted rape, and seven on the specifications alleging indecent liberties, lascivious acts and the indecent assault in violation of Article 134, UCMJ, for lack of subject-matter jurisdiction. J.A. 68.

The fourteen specifications petitioner moved to dismiss all alleged offenses at Juneau, Alaska. J.A. 8-15. The seven remaining specifications alleged similar, but unrelated, offenses at Governors Island, New York, a Coast Guard base. J.A. 6-8.

After hearing evidence and argument on the motion, the trial judge dismissed the fourteen specifications alleging offenses at Juneau and the charges of violating Article 128 and Article 80, UCMJ, because the offenses lacked service-connection. J.A. 195. The trial judge made findings of fact<sup>4</sup> on the record, J.A. 195-200, and prior to authenticating the record attached supplemental findings of fact. Pet. App. F, pp. 62a-63a.

The dismissed charges and specifications allege offenses against two girls. J.A. 8-15. The fathers of these girls

<sup>1</sup> 10 U.S.C. § 934 (1982).

<sup>2</sup> 10 U.S.C. § 928 (1982).

<sup>3</sup> 10 U.S.C. § 880 (1982).

<sup>4</sup> Rule 905(d), Rules for Court-Martial, Manual for Courts-Martial, United States, 1984, requires the military judge to state his essential findings of fact on the record when factual issues are involved in determining a motion.



were, like petitioner, active duty members of the Coast Guard assigned to the staff of the Commander, Seventeenth Coast Guard District. J.A. 48. All the offenses allegedly occurred in petitioner's privately owned home eleven miles from the Federal Office Building in downtown Juneau where he worked. J.A. 8-15 and 50. The alleged victims and their families also lived in civilian housing, there being no government quarters in Juneau for anyone other than the District Commander. J.A. 47-48.

In Juneau at the time of the alleged offenses there was no Coast Guard controlled post or enclave where many service personnel lived and worked. Pet. App. B, note 1 at 20a. The closest equivalent in Juneau was the Coast Guard Station, a 1.3 acre facility with a complement of fourteen enlisted persons. *Id.* Over two hundred Coast Guard military personnel were assigned to the district office, occupying four of the nine floors of the Juneau Federal Office Building, where other Federal agencies are also located. Pet. App. B, note 1 at 21a. The Coast Guard Marine Safety Office situated in a building adjacent to the Federal Office Building had a military complement of seventeen persons. *Id.* With the possible exception of some of the complement of six officers and forty-nine enlisted personnel on the buoy tender berthed at the Coast Guard Station, all of the approximately three hundred Coast Guard military personnel in Juneau lived in the civilian community. *Id.*

A friendship had grown between petitioner and the families of the alleged victims, grounded in one case on the common sporting interests of bowling and basketball, and in the other, on the fortuity of living next door. J.A. 48-49. The alleged victims came to petitioner's home on a regular basis to visit with his two sons. *Id.* Both girls at one time played on a soccer team coached by petitioner and they bowled in a league in which he was active. J.A. 51 and 53. These associations were much more significant than any military relationship between

petitioner and the fathers of the alleged victims, which the trial judge found to be *de minimis*. J.A. 198.

There was no evidence that any of the allegations have become common knowledge, even among the Coast Guard personnel, at Juneau. No allegations were made against petitioner until all parties had been permanently transferred to duty stations outside Alaska. Pet. App. B, 21a. Petitioner was stationed at Juneau from November 1980 to June 1984. J.A. 50. Warrant Officer Johnson and his family, including Amber Johnson, left Juneau in June 1983. J.A. 48. Amber did not make any allegations against petitioner until March 1985. J.A. 107. Petty Officer Grantz and his family, including Jennifer Grantz, left Juneau in June 1984. J.A. 48. Jennifer did not make any allegations against petitioner until about April 1985. J.A. 123.

The Alaska prosecutor, in a letter to the Coast Guard, stated "that at this time, subject to future evaluation or developments, that the Department of Law, Criminal Division, State of Alaska, will defer prosecution of Yeoman First Class Richard Solorio, United States Coast Guard, to the legal prosecutorial arm of the Coast Guard." Opp. 1a. However, there was also evidence that the State of Alaska had recently prosecuted two similar cases involving members of the Coast Guard with results highly satisfactory to the Coast Guard. J.A. 65-66. And at trial, Special Agent Gary Smith testified that the State of Alaska was continuing to investigate allegations that the accused had sexually abused the children of other civilians still living in Juneau. J.A. 149-150.

The accused is presently assigned to Coast Guard Group New York at Governors Island, New York, where he lives in Government quarters and where the instant general court-martial was convened. J.A. 50.

In his findings of fact, the trial judge addressed the twelve *Relford* factors<sup>5</sup> and the nine additional *Relford*

<sup>5</sup> See *Relford v. Commandant*, 401 U.S. 355, 365 (1971), and *infra* note 18.

considerations,<sup>6</sup> and found that none of them supported a finding of service-connection. J.A. 196-198. Additionally, the military judge considered, among other things, the military relationship between petitioner and the servicemember fathers of the alleged victims, the effect of the alleged offenses on morale, discipline or effectiveness within the military community in Juneau, the reputation of the Coast Guard with the civilian community in Juneau, the relation of the offenses alleged to have been committed in Alaska to the offenses alleged to have been committed in New York, and the impact of the alleged offenses on the servicemember fathers of the alleged victims and through them on the service. J.A. 198-200; Pet. App. F, pp. 62a-63a. The military judge found that the asserted impact upon the service was too remote and indirect to support service-connection.<sup>7</sup>

The government appealed the military judge's ruling to the Coast Guard Court of Military Review and that court granted the government's appeal, reversing the military judge. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985) Pet. App. B, pp. 18a-42a. Before the Coast Guard Court of Military Review petitioner argued, in opposition to the government's appeal, that the military judge had properly applied the service-connection test required by *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), and properly found that the facts of this case did not support subject-matter jurisdiction.

<sup>6</sup> See *Relford v. Commandant*, 401 U.S. 355, 367-369 (1971), and *infra* note 19.

<sup>7</sup> "In this case there is no direct impact on the service. The indirect impact that exists is not sufficient to create service-connection. That indirect impact consists of servicemember-parents' preoccupation with family situation affecting the members' performance, some initial counseling and referral from persons whose position it is to take such action, and time to participate in proceedings under the U.C.M.J." Military Judge's Supplemental Findings of Fact, Pet. App. F, pp. 62a-63a.

The United States Court of Military Appeals granted review of the Coast Guard Court's decision and affirmed. *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), Pet. App. A, pp. 1a-17a. In his petition for grant of review, petitioner argued that the Court of Military Review's decision was incorrect because it had not properly applied the service-connection test required by *O'Callahan*, and *Relford*, and because the military judge had properly found that the facts did not support subject-matter jurisdiction.

The court-martial proceedings went forward on February 18, 1986, and on March 11, 1986, petitioner was convicted of eight of the fourteen specifications alleging offenses in Alaska. Petitioner was also convicted of four of the seven specifications alleging offenses in New York. Petitioner filed a petition for a writ of certiorari on March 26, 1986, and the petition was granted on June 16, 1986.

#### SUMMARY OF ARGUMENT

I. The decision of the United States Court of Military Appeals should be reversed because it conflicts with this Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), and expands court-martial subject-matter jurisdiction beyond the constitutional limits spelled out in those cases. The Court of Military Appeals has erred because it failed to apply this Court's service-connection test and, instead, applied an incorrect standard which is so pliable it is meaningless.

The service-connection test was first set out in *O'Callahan*. The Court clearly intended the test to balance the military interest in prosecuting a civilian offense at court-martial against the servicemember's interests in the greater constitutional protections of a civilian trial. In *Relford* this Court responded to criticism that "the infinite permutations of possibly relevant factors", which the service-connection test might have included, would create confusion about the limits of court-martial juris-



diction, see *O'Callahan* at 284 (Harlan, J., dissenting); identifying the twelve factors and nine additional considerations that are relevant and significant. By thus limiting the relevant criteria this Court eliminated the danger of confusion and proliferating litigation over court-martial jurisdiction.

The *Relford* service-connection analysis has served as a model for lower courts for over fifteen years and as a result of the consistent application of the *Relford* criteria the concept of service-connection has evolved into a well-defined principle of law. In this case, however, the Court of Military Appeals did not bother with a complete *Relford* analysis. Rather, it principally relied on its holding that, as a matter of law, the effect of petitioner's offenses on the victims' servicemember fathers created an impact on the Coast Guard sufficient to support court-martial jurisdiction. In effect, this holding bases jurisdiction solely on the dependent status of the victims.

No court, applying this Court's *Relford* analysis, has ever found that the dependent status of the victim is, by itself, sufficient to support court-martial jurisdiction. But the Court of Military Appeals has rejected the *Relford* analysis as too inflexible, and in this case it employed its own flexible subject-matter analysis. That analysis is not bound by the result that application of the *Relford* criteria requires, and does not set any limits on other criteria that may be considered. It renders the service-connection test so pliable it is meaningless, and it provides servicemembers no protection of their right to the greater constitutional protections of a civilian trial for civilian offenses.

The Court of Military Appeals' flexible subject-matter jurisdiction analysis invites the confusion of the limits of court-martial jurisdiction that was feared before the *Relford* decision. Moreover, the Court of Military Appeals is using its flexible service-connection test, case by case, to eviscerate the *O'Callahan* and *Relford* decisions. Contrary to the intent of *O'Callahan* and *Relford*, the

Court of Military Appeals' flexible test fails to properly balance the servicemember's interest in a civilian trial against the military interest in trying the offenses at court-martial. The Court of Military Appeals' decision suggests that any asserted impact upon the military, regardless of how remote or indirect, will be sufficient to outweigh the servicemember's constitutional rights.

While *Relford* requires that service-connection be determined on an *ad hoc* basis, according to the facts of each case, this decision permits military courts to find an offense by its nature, *per se*, service-connected. This decision cannot be limited to child sexual abuse cases, because the psychological effect on the victim and the victim's family, and the impact on the military, will be the same whenever any serious crime is committed by a servicemember against a military dependent.

The Court of Military Appeals' attempts to justify its departure from this Court's, and its own, precedents are not persuasive. The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Relford* were decided. No developments since then, in the military or society, justify expansion of court-martial jurisdiction over civilian offenses. Our society's increased concern for the victims of crime is no more reason to take the right to a civilian trial away from servicemembers than it is a reason for subjecting civilians to trial by court-martial. Moreover, the State of Alaska has recently enacted statutes protecting the rights of victims, and there is no reason to believe that state officials would have been any less interested than the military in protecting the victims' rights. Finally, the pendency of other military charges and the deferral of the civilian authorities to the military should not be relied upon as major considerations supporting military jurisdiction. The *O'Callahan* and *Relford* decisions properly did not give such factors weight in the service-connection determination. These factors are too easily manipulated and too far removed from the real interests that should be balanced to provide well defined limits on court-martial jurisdiction.



II. The Court of Military Appeals' decision should be reversed because the facts of this case do not demonstrate a military interest that outweighs the petitioner's interest in a civilian trial. The offenses were committed in petitioner's home in the civilian community at Juneau, Alaska. There is no military base or enclave in Juneau where servicemembers and their families live. Virtually all of the members of the Coast Guard stationed in Juneau, and their families, live in the civilian community. Moreover, no allegations were made against petitioner until after he and his victims had left Juneau. As a result, these offenses have not become public knowledge there, even among servicemembers.

These facts made it impossible for the Government to demonstrate any direct or significant impact from these offenses on the Coast Guard. The trial judge correctly found that any impact of the Alaska offenses on the Coast Guard was remote and indirect. He did not base his decision strictly on the twelve *Relford* factors and the nine additional *Relford* considerations. He also focused on whether the military interest in prosecuting these offenses was different from, and greater than, that of civilian courts. The trial judge, nevertheless, found that the Government had failed to meet its burden of proving jurisdiction.

The trial judge's findings aside, application of the *Relford* criteria make it clear that the facts of this case simply cannot support court-martial jurisdiction. None of the *Relford* criteria support subject-matter jurisdiction. The Government failed to prove that these offenses had any impact on the Coast Guard at Juneau or at Governors Island, where petitioner was subsequently assigned. The offenses which petitioner committed on Governors Island, which are not at issue here, are far more likely to have been responsible for any impact on Governors Island than the offenses committed thousands of miles away in Alaska, months before petitioner arrived on Governors Island.

Furthermore, even if it were permissible to ignore the *Relford* criteria where the Government proves a distinct military interest in the offenses that cannot be adequately vindicated in civilian courts, the Government has failed to prove that here. The victims in this case were not servicemembers, and there are no other facts in this case sufficient to support service-connection. There is only evidence that these alleged offenses have had an effect on the victims' fathers, who are servicemembers. The Coast Guard has attempted to bootstrap this single factor into grounds for finding service-connection by asserting every imaginable impact stemming from the effect of these offenses on the victims and their fathers. In fact, however, there has been only a remote and indirect impact on the Coast Guard, and any military interest in these offenses could be adequately vindicated in the civilian courts.

III. This Court should not hesitate to enforce the *O'Callahan* and *Relford* decisions because those decisions strike the proper balance between the servicemember's right to a civilian trial for a civilian offense and the military's interest in discipline. Moreover, the concept of service-connection has evolved into a well-defined principle of law. *O'Callahan* and *Relford* were properly decided because there has been no appreciable cost in terms of military discipline for the servicemember's right to a civilian trial, during the more than fifteen years since those cases were decided. The Court of Military Appeals' decision is incorrect, not only because it fails to strike the proper balance between the rights of the servicemember and the proper interests of the military, but also because it conflicts with, and injects unwarranted confusion into, the settled law of subject-matter jurisdiction.

This is not a case like *Goldman v. Weinberger*, — U.S. —, 106 S.Ct. 1310 (1986), where this Court might need to try to predict the impact of new limitations on military authority or where respect for Congress' and the President's authority over national defense and

military affairs requires unusual deference to the military. The limits on court-martial subject-matter jurisdiction were set out more than fifteen years ago in the *O'Callahan* and *Relford* decisions, and those decisions have not had an appreciable cost in terms of military discipline. Furthermore, in *O'Callahan*, this Court found that prosecution of offenses that are not service-connected is beyond the scope of Congress' authority over national defense and military affairs, or is at least a constitutionally inappropriate exercise of that authority. Any remaining doubts about the propriety of this Court's subjecting the decision below to rigorous appellate review must give way to the recent judgment of Congress in extending this Court's jurisdiction, for the first time, to cases on appeal from the Court of Military Appeals. See Military Justice Act of 1983, Pub.L.No. 98-209, § 10, 97 Stat. 1393, 1405 (1983).

IV. The Court of Military Appeals' decision should be reversed because it departs from its own precedents and applies a more expansive subject-matter jurisdiction test to petitioner. Application to petitioner, in the same case, of this interpretation which expands the reach of the Uniform Code of Military Justice, violates Fifth Amendment due process. *Marks v. United States*, 430 U.S. 188 (1977); *Bowie v. City of Columbia*, 378 U.S. 347 (1964). *Bowie* and *Marks* have held that a court cannot, by reinterpreting the law, do in effect what the *ex post facto* clause prohibits the legislature from doing, because that violates the accused's right to due process. *United States v. Goodhiem*, 651 F.2d 1294, 1297 (9th Cir. 1981).

In *O'Callahan* and *Relford* this Court has confined the sweeping language of the Uniform Code of Military Justice within Constitutional limits. Here, however, the Court of Military Appeals has relaxed the constitutional limits on the reach of the Uniform Code of Military Justice, and in particular Articles 80, 128 and 134, 10 U.S.C. §§ 880, 928 and 934, as they relate to off-base sex offenses against civilian dependents. This decision is

contrary to the Court of Military Appeals' own precedents which held that conduct like that involved here was beyond the reach of the Uniform Code of Military Justice. *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969). This violates the petitioner's due process rights, not because he was not on notice that his acts might be crimes in the abstract or under state law, but because it makes a federal crime out of conduct that was not a federal crime at the time the acts were committed, by retroactively expanding court-martial jurisdiction. See *Woxberg v. United States*, 329 F.2d 293 (9th Cir. 1964); *United States v. Juvenile*, 599 F. Supp. 1126 (D. OR 1984). This is important because it disadvantages petitioner by depriving him of the greater constitutional protections of a trial in a civilian court and defeats his defense of lack of court-martial jurisdiction. The decision of the Court of Military Appeals has the effect of an *ex post facto* law, therefore, it violates petitioner's fifth amendment due process rights and should be reversed.

## ARGUMENT

### I. THE COURT OF MILITARY APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT CONFLICTS WITH THIS COURT'S PRECEDENTS BY FINDING THAT THE VICTIM'S DEPENDENT STATUS ALONE IS SUFFICIENT TO SUPPORT COURT-MARTIAL JURISDICTION.

#### A. The Court Of Military Appeals Did Not Apply This Court's Service-connection Test, But An Incorrect Standard Which Is So Pliable It Is Meaningless.

The decision of the United States Court of Military Appeals should be reversed because it conflicts with this Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258



(1969), and *Relford v. Commandant*, 401 U.S. 355 (1971). The Court of Military Appeals' decision expands court-martial subject-matter jurisdiction beyond the constitutional limits spelled out in *O'Callahan* and *Relford*.

The Court of Military Appeals' decision does not address the *Relford* factors and considerations, or the fact that the trial judge considered all of them and did not find a single one that supported service-connection. Instead, the decision relies principally on a holding that, as a matter of law, the effect of the dismissed offenses on the fathers of the alleged victims caused an impact on the Coast Guard sufficient to support subject-matter jurisdiction. This holding bases jurisdiction solely on the dependent status of the victims and is inconsistent with the trial judge's finding of fact that the impact of the dismissed offenses on the fathers of the alleged victims had only a remote and indirect impact on the Coast Guard. See *supra* note 7.

In this case, the Court of Military Appeals has obviously employed its flexible subject-matter jurisdiction analysis;<sup>8</sup> an analysis that is not bound by the result that application of the *Relford* factors and considerations requires, and that does not set any limits on other criteria that may be considered. This analysis renders the service-connection test so pliable it is meaningless and its provides servicemembers no protection of their right to a civilian trial for civilian offenses.

The Court of Military Appeals' decision does not give proper consideration to the interests of servicemembers. It suggests that any asserted impact upon the military, regardless of how remote or indirect, will be sufficient to outweigh the servicemember's interest in the greater

<sup>8</sup> The United States Court of Military Appeals began its departure from what it termed a "slavish" application of the *Relford* criteria in *United States v. Trotter*, 9 M.J. 337 (C.M.A. 1980). It has continued this trend in its decisions in *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983); *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983); *United States v. Johnson*, 17 M.J. 73 (C.M.A. 1983); and in the instant case.

constitutional protections of a civilian trial. The Court of Military Appeals seems to have embraced the position of one writer who has suggested that the imagination of the government is the only limitation on court-martial subject-matter jurisdiction.<sup>9</sup>

The Court of Military Appeals, in this decision and in others,<sup>10</sup> gives military courts a completely free hand to find service-connection on the basis of any single factor or combination of factors, tangible or intangible, proven or presumed. While rejecting the *Relford* factors and considerations as too inflexible, the Court of Military Appeals has not placed any limitations on other factors that can support subject-matter jurisdiction. The Court of Military Appeals' decision, at the very least, sets the law of service-connection back to the time, after *O'Callahan* but before the *Relford* decision, when one Justice predicted that the "infinite permutations of possibly relevant factors"<sup>11</sup> would create confusion about the limits of subject-matter jurisdiction.

Prior to the *Relford* decision, it was those who favored expansive military jurisdiction that seemed most concerned about the unlimited factors that could be considered in deciding whether or not an offense was service-connected. They were concerned that military interests would not receive proper consideration. Now it is the servicemember who is concerned that his individual interests are not being protected.

The Court of Military Appeals is not only creating confusion in this area of the law, it is using its flexible service-connection test, case by case, to eviscerate the *O'Callahan* and *Relford* decisions. In *United States v.*

<sup>9</sup> Tomes, *The Imagination of the Prosecutor: The Only Limitation to Off-Post Jurisdiction Now, Fifteen Years After O'Callahan v. Parker*, 25 A.F.L.Rev. 1 (1985).

<sup>10</sup> See *supra* note 8.

<sup>11</sup> *O'Callahan v. Parker*, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting).



*Trottier*, 9 M.J. 337 (C.M.A. 1980), the Court of Military Appeals extended military subject-matter jurisdiction to all drug offenses. In this case it has extended military subject-matter jurisdiction to all sex offenses against dependents. In one of its latest subject-matter jurisdiction cases, the Court of Military Appeals has indicated that it may be willing to accept the position that all offenses committed by officers are service-connected. *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986).

The Coast Guard Court of Military Review's decision in this case is a perfect example of how ready military courts are to exercise and expand the freedom the Court of Military Appeals has given them, to find jurisdiction based on the flimsiest claim of military interest. That decision bases subject-matter jurisdiction primarily on the potential impact of the Alaska offenses on petitioner's military neighbors at Governors Island. The impact was inferred entirely from the nature of the alleged offenses, even though the offenses allegedly occurred many months before they were disclosed and thousands of miles from Governors Island. Although the Government had the burden of proving jurisdiction by a preponderance of the evidence, *see* Rules 905(c)(1), and 905(c)(2)(B), R.C.M., MCM 1984, the Coast Guard Court inferred the potential impact without any proof of actual impact on Governors Island.

As this obviously suggests, the Court of Military Appeals' flexible analysis permits military courts to broadly infer impact from the nature of the offense. As a result, an offense may be found to be service-connected *per se*, in violation of this Court's requirement for a fact based determination of service-connection. *See Relford v. Commandant*, 401 U.S. 355, 365-366 (1971). The Court of Military Appeals' decision, in this case, certainly implies that every sex offense committed by a servicemember against a child dependent is *per se* service-connected. *United States v. Solorio*, 21 M.J. 251, 256 (C.M.A. 1986).

Any offense committed by a servicemember has some impact on the service, at the very least, the military is deprived of the members services while he is prosecuted and serving his sentence, and it casts the military in a bad light when his uniformed status is exposed. However, to allow such impact, by itself, to support subject-matter jurisdiction is tantamount to substituting a status test for the service-connection test.

Moreover, the Court of Military Appeals' decision cannot be limited to child sexual abuse cases, because the psychological effect on the victim and the victim's family, and the impact on the military, will be the same whenever any serious crime is committed by a servicemember against a military dependent. The psychological impact of a murder, or any other violent crime, on the victim's family and any resulting indirect impact on the military, will be just as severe as the impact from sexual abuse. Child sexual abuse is currently the subject of widespread public and media attention; in time that attention is likely to refocus on other tragic crimes. "Jurisdiction to punish rarely, if ever, rests upon such illogical and fortuitous contingencies." *Hirshberg v. Cooke*, 336 U.S. 210, 214 (1949).

No previous case has held that the dependent status of a victim is sufficient to support subject-matter jurisdiction over an offense that has no significant and direct impact on the military. The dependent status of the victims was one of the factors supporting jurisdiction in *Relford*; but there were other significant factors, including the fact that the offenses were committed on a military post. In this case, however, the offenses occurred in the civilian community, at a place where there is no military post at which servicemembers and their families live. Furthermore, the offenses have never become public knowledge, even among servicemembers, at the place where they occurred.

**B. The Court Of Military Appeals Has Failed To Justify Its Departure From This Court's Precedents And Its Own Precedents.**

The Court of Military Appeals has erred in suggesting that developments in the military and in society since the *O'Callahan* and *Relford* decisions justify rejection of its own precedents which properly applied those decisions. *United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986). The need to limit court-martial jurisdiction to its proper domain is as great now as it was when *O'Callahan* and *Relford* were decided.

Our society's increased concern for the victims of crime is no more reason to take the right to a civilian trial away from servicemembers than it is a reason for subjecting civilians to trial by court-martial. Any victim who felt that "a military trial is marked by the age-old manifest destiny of retributive justice"<sup>12</sup> might prefer a trial by court-martial. That does not, in any way, justify depriving an accused of constitutionally protected trial rights.

Increased concern for victims is not a singularly military phenomenon. State officials would have been equally interested in protecting the victims' rights, if this case had been tried in state court.<sup>13</sup> As the Court of Military Appeals has pointed out, Congress and state legislatures have made changes in civilian criminal systems to protect more fully the rights of victims. *United States v. Solorio*, 21 M.J. 251, 254-255 (C.M.A. 1986). Civilian courts, certainly, have not interpreted such changes as authority for the abridgment of constitutionally protected rights.

<sup>12</sup> *O'Callahan v. Parker*, 395 U.S. 258, 266 (1969).

<sup>13</sup> As the American Civil Liberties Union *Amicus Curiae* Brief in support of the petition for a writ of certiorari pointed out, Alaska has statutes protecting the rights of victims. Alas. Stat. §§ 12.55.022, 12.55.025, 12.61.010, and 33.15.065 (1984).

The Court of Military Appeals also erred in relying on the pendency of other military charges and the deferral of the civilian authorities to the military as major considerations supporting military jurisdiction. The *O'Callahan* and *Relford* decisions properly do not give such factors weight in the service-connection determination. These factors are too easily manipulated and too far removed from the real interests that should be balanced to provide well defined limits on court-martial jurisdiction.

The Government's major argument, in its Brief in Opposition, suggesting that the Court of Military Appeals' decision does not conflict with this Court's decisions or unconstitutionally expand court-martial jurisdiction, is based on a false premise. It asserts, based on language from the decision of the Coast Guard Court of Military Review, that, where there is no military base or enclave, a unit commander has the same responsibility for the welfare of dependents living in the civilian community that a base commander has for dependents living on-base. Opp. at 13.

Building on that improbable assertion, it states "it is reasonable to treat offenses committed against Coast Guard servicemen and their dependents in Juneau as if they were committed on a military base", *id.*, even though there is no military base at Juneau and the offenses occurred in petitioner's home in the civilian community. The Government concludes that the decisions of the courts below are consistent with *Relford*, because it is "immaterial" that the offenses occurred off-base. *Id.* Having thus disposed of these issues to its satisfaction, the Government goes on to treat petitioner's arguments as if he were simply relying on past Court of Military Appeals decisions, rather than *O'Callahan* and *Relford*. *Id.* at 16-17.

There is no basis in fact or law for the assertion that the commander of a unit, at a place where there is no military base, has the same responsibility for the welfare



of dependents living in the civilian community as for dependents living on-base. Moreover, there is no basis in fact or law for the assertion that it is immaterial whether the offenses occurred off-base or on a military enclave. *O'Callahan*, and perhaps even more so *Relford*, make it clear that the situs of the offense is directly relevant to, and often determinative of, court-martial jurisdiction.

The only argument supporting these assertions that the Government can suggest is that a contrary result would unreasonably restrict a unit commander's ability to protect civilian dependents. Opp. at 13. This argument begs the question, however, because under this Court's decisions, civil authorities have primary responsibility for protecting civilian dependents unless the military can demonstrate some military interest in the case that outweighs the accused's interest in the constitutional protections he would receive in a civilian trial. The suggestion that a unit commander's interest in protecting civilian dependents against off-base crimes by service-members, *per se*, outweighs the accused's interest in a civilian trial, clearly conflicts with *O'Callahan* and *Relford*.

The Government also suggests without basis that the Court of Military Appeals, only now, has simply reconsidered in light of *Relford* which was decided fifteen years ago, its earlier decisions on off-base offenses against dependents. Opp. at 17-18. The Court of Military Appeals, however, states that its apparent abandonment of those decisions is based on what it perceives to be changed conditions. Pet. App. A, 9a. Moreover, the Court of Military Appeals has not just reconsidered its prior decisions in light of a consistent interpretation of *Relford*, as the Government implies. Opp. at 17-18. It has recently reconsidered its interpretation of *O'Callahan* and *Relford* so as to free itself to greatly expand court-martial jurisdiction beyond the constitutional limits set out in those cases.

The Government's claim that the *McGonigal*, *Shockley*, and *Henderson*<sup>14</sup> decisions turned on the connection between the offenses and the accused's duties, opp. at 17, rather than the situs of the offense, is most clearly belied by the *Shockley* case, which involved both on-base and off-base offenses. There, the on-base offenses were found to be service-connected and the off-base offenses were found not to be service-connected.

Apparently unwilling to meet petitioner's argument that there are no changed circumstances to justify the Court of Military Appeal's expansion of court-martial jurisdiction beyond the constitutional limits set out in *O'Callahan* and *Relford*, the Government resorts to the fiction that the Court below has merely reconsidered its prior decisions in light of *Relford*. This certainly is not a fair reading of the cases. By rejecting its own prior decisions which were consistent, and roughly contemporaneous, with this Court's decisions, the Court of Military Appeals has decided the instant case in a way that conflicts with *O'Callahan* and *Relford*.

The Government asserts that the Court of Military Appeals relied on the *Relford* factors to decide this case and that, therefore, the case does not present the question of whether the dependent status of the victim alone is sufficient to support court-martial jurisdiction. Opp. at 16. In fact, however, rather than balancing all of the *Relford* factors to determine whether the military interest in trying the case outweighed the petitioner's interest in a civilian trial, the Court of Military Appeals based its decision on just a few considerations which it found to favor military jurisdiction. The only impacts upon the military were indirect, and flowed from the dependent status of the victims. *Infra* pp. 23-36.

<sup>14</sup> *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).



The Government suggests, without citing any evidence or other support, that "[t]he military has an obvious and substantial interest in being able to bring criminal charges against a serviceman for sexually abusing military dependents." Opp. at 14. But the bare suggestion does not make it so.

The Government also suggests that crews at sea for long periods must feel secure about the safety of their families in order to carry out their responsibilities. Opp. at 14. However, there is no evidence that prosecution of offenders by civil authorities would make these crewmen uneasy, and there is no evidence that the servicemember fathers of the victims in this case were assigned to sea duty at the time of the offenses, or at any time since. In any event, such considerations alone cannot properly support court-martial jurisdiction.

The Court of Military Appeals' decision should be reversed because it employed an incorrect standard to find that there was subject-matter jurisdiction. That flexible standard not only conflicts with the *O'Callahan* and *Relford* decisions, it is so pliable that it renders the service-connection test, which is at the heart of those decisions, meaningless. If this Court does not decide the question of military subject-matter jurisdiction, here, by a detailed and thorough balancing of the *Relford* factors and considerations, it will encourage military commanders and the military courts to continue to expand jurisdiction, in every significant case, by employing the "infinite permutations of possibly relevant factors"<sup>15</sup> to support military jurisdiction.

<sup>15</sup> *O'Callahan v. Parker*, 395 U.S. 258, 284 (1969) (Harlan, J., dissenting).

## II. THE FACTS OF THIS CASE CANNOT SUPPORT COURT-MARTIAL JURISDICTION BECAUSE THEY DO NOT DEMONSTRATE A MILITARY INTEREST THAT OUTWEIGHS THE ACCUSED'S INTEREST IN A CIVILIAN TRIAL.

### A. The Trial Judge Properly Found That The Facts Of This Case Do Not Support Court-Martial Jurisdiction.

Another reason for reversing the Court of Military Appeals' decision is that the facts of this case cannot support subject-matter jurisdiction. Petitioner submits that the trial judge was correct in finding that the Coast Guard lacked subject-matter jurisdiction over the charges and specifications he dismissed.

The trial judge's findings of fact are supported by the record; those findings are not clearly erroneous or untenable. The trial judge considered and properly applied all applicable law; he did not abuse his discretion. The burden of persuasion on factual issues related to a motion to dismiss for lack of jurisdiction is on the Government. Rule 905(c)(2)(B), R.C.M., MCM 1984. The burden of proof on any factual issue necessary to decide the motion is also on the Government, by a preponderance of the evidence. Rule 905(c)(1), R.C.M., MCM 1984.

In this case, the two most significant facts bearing on the issue of service-connection are, that there is no Coast Guard base or enclave, in the usual sense of those words, at Juneau, Alaska, and that the allegations against appellant were not made until long after all of the parties to the offenses had left Juneau, so that the allegations have not become public knowledge there. These facts, and the inferences and conclusions that can be drawn from them, underlie many of the trial judge's findings. Because of these facts the impact of the Alaska offenses on the Coast Guard was remote and indirect.

The trial judge did not base his decision strictly on the twelve *Relford* factors and the nine additional *Relford*

considerations. Following this Court's language in *Schlesinger v. Councilman*, 420 U.S. 738 (1975),<sup>16</sup> he also focused on whether the military interest in prosecuting these offenses was different from, and greater than, that of civilian courts. The trial judge, nevertheless, found that the Government had failed to meet its burden of proving jurisdiction.<sup>17</sup> J.A. 196.

Because of other recent departures by the Court of Military Appeals from this Court's precedents, *see supra* note 8, the trial judge explicitly stated that he recognized "a continuing evolution of the concept of subject-matter jurisdiction . . . ." J.A. 196. But even taking that into account, he concluded that the facts of this case do not support a finding of service-connection.

**B. Application Of The Twelve *Relford* Factors And Nine Additional *Relford* Considerations To The Facts Of This Case Make It Clear That The Facts Cannot Support Court-Martial Jurisdiction.**

None of the twelve *Relford* factors<sup>18</sup> supports court-

<sup>16</sup> "[The] issue turns in major part on gauging the impact of an offense on military discipline and effectiveness, on determining whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and on whether the distinct military interest can be vindicated adequately in civilian courts." *Id.* at 760.

<sup>17</sup> The trial judge stated, "I find that the Coast Guard interest in deterring these offenses is not distinct from that of civilian society and is less than that of civilian society, and what little if any distinct military interest there may be, can be adequately vindicated in civilian courts. J.A. 200.

<sup>18</sup> Those factors are:

1. The serviceman's proper absence from the base.
2. The crimes commission away from the base.
3. Its commission at a place not under military control.
4. Its commission within our territorial limits and not in an occupied zone of a foreign country.
5. Its commission in peacetime and its being unrelated to authority stemming from the war power.

martial subject-matter jurisdiction in this case. Moreover, none of the nine additional *Relford* considerations<sup>19</sup> supports court-martial subject-matter jurisdiction.

6. The absence of any connection between the defendant's military duties and the crime.
7. The victim's not being engaged in the performance of any duty relating to the military.
8. The presence and availability of a civilian court in which the case can be prosecuted.
9. The absence of any flouting of military authority.
10. The absence of any threat to a military post.
11. The absence of any violation of military property.
12. The offenses being among those traditionally prosecuted in civilian courts.

*Relford v. Commandant*, 401 U.S. 355, 365 (1971).

<sup>19</sup> Those considerations are:

- a. The essential and obvious interest of the military in the security of persons and of property on the military enclave;
- b. The responsibility of the military commander for maintenance of order in his command and his authority to maintain that order;
- c. The impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon the morale, discipline, reputation and integrity of the base itself, upon its personnel, and upon the military operation and the military mission;
- d. Article I, section 8, clause 14 of the Constitution of the United States, vesting in Congress the power "To make Rules for the Government and Regulation of the land and naval Forces," means, in appropriate areas beyond the purely military offense, more than the mere power to arrest a servicemember-offender and turn that person over to the civil authorities;
- e. The distinct possibility that civil courts, particularly non-federal courts, will have less than complete interest, concern, and capacity for all the cases that vindicate the military's disciplinary authority within its own community;
- f. The presence of factors such as geographical and military relationships which have important significance in favor of service-connection;
- g. Historically, a crime against the person of one associated with the post was subject even to the General Article;
- h. The misreading and undue restriction of *O'Callahan* if it were interpreted as confining the court-martial to the purely military offenses that have no counterpart in nonmilitary criminal law;



There was no evidence that any of the offenses occurred at a time when petitioner was not properly absent from his unit on leave or liberty. The offenses were committed in petitioner's home in the civilian community of Juneau, Alaska. Petitioner's home in the civilian community is not a place under military control, and Juneau is within the territorial limits of the United States.<sup>20</sup>

There was no evidence that petitioner was on-duty when the offenses were committed, that he formed the intent to commit these offenses while on-duty, or that he had a continuing intent to commit these offenses which extended to on-duty hours. Captain Caprio could not testify that petitioner was a pedophile or had any continuing attraction to young girls, much less that he formed the intent to commit these offenses while on-duty. J.A. 142.

The offenses were committed in peacetime, and are unrelated to the war powers because they do not pose a threat to the reliability and efficiency of the armed forces.<sup>21</sup> Despite the Government's attempts to show some evidence to the contrary, these offenses had only a remote and indirect impact on the Coast Guard. There is no evidence that offenses like those committed here are so rampant in the armed forces or have such disastrous effects on the health, morale and fitness for duty of

i. The inability appropriately and meaningfully to draw any line between a post's strictly military areas and its nonmilitary areas, or between a servicemember's duty and off-duty activities and hours on the post.

*Relford v. Commandant*, 401 U.S. 355, 367-369 (1971).

<sup>20</sup> The trial judge correctly found that: "the accused was properly absent from his unit at the time of each of the alleged offenses"; "[e]ach offense was alleged to have occurred away from any military base at the accused's residence in the civilian community"; "[e]ach offense was alleged to have occurred in a place not under military control"; and "[e]ach offense was alleged to have occurred within the territorial limits of the United States." J.A. 196.

<sup>21</sup> The trial judge's correctly found that: "all offenses were unrelated to authority stemming from the war power." J.A. 196.

servicemembers that they can be said to pose a significant threat to the reliability and efficiency of the armed forces.

There was no connection between petitioner's military duties and the offenses.<sup>22</sup> Other family and neighborly relationships were more significant factors in enabling petitioner to commit the alleged offenses than his status as a member of the Coast Guard.<sup>23</sup>

The victims are not servicemembers and they were not engaged in any duty related to the military when the offenses occurred.<sup>24</sup> They visited petitioner's home for personal social purposes. J.A. 48-49, 52 and 53-54.

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<sup>22</sup> The trial judge correctly found that petitioner: "did not use his military position to commit any of the offenses, nor did he commit any of the alleged offenses while performing his military duties." J.A. 196.

<sup>23</sup> The trial judge correctly found that: "[t]here was a *de minimus* [sic] military relationship between the accused and the military fathers of the victims." J.A. 198. This finding is explained by his further finding, regarding the fathers' relationships to petitioner, that "[t]hose relationships were founded primarily upon the ages and activities of the children and additionally upon common sporting interests, common spousal interest and employment and neighborly relationships." *Id.* The trial judge found that the military relationship between petitioner and the victims' fathers was slight compared to other factors that fostered the families' relationships. He also correctly found that any abuse of trust arising from petitioner's status as a member of the Coast Guard was minimal and had no direct relationship to the offenses, because any trust bearing on the opportunity to commit these offenses arose from friendships between the families. Supplemental Essential Findings of Fact, Pet. App. F, 62a.

<sup>24</sup> The trial judge correctly found that: "[t]he victims were not service members and were not involved in military duties or military supported or sponsored activities at the time of any of the alleged offenses." J.A. 196.



Alaska state courts are present and available to prosecute these offenses.<sup>25</sup> The Assistant District Attorney's deferral of prosecution is clearly conditional, it states "that at this time, subject to future evaluation or developments" the State of Alaska will defer prosecution. Opp. at 1a. It does not waive or decline prosecution. In any event, the Court of Military Appeals properly found that the Alaska prosecutor's letter was not entitled to much weight. Pet. App. A, 13a. That Court had the prescience to suspect that an aggressive military prosecutor might seek to persuade civil authorities to defer prosecution, in a case they otherwise would prosecute, to create court-martial jurisdiction. *Id.* Moreover, if there can be any remaining doubt about the availability of the Alaska courts it should be dispelled by the stipulation of expected testimony of Louis Menendez, the Alaska Assistant District Attorney, which states "[s]hould the Coast Guard determine, however, that the court-martial is without jurisdiction to prosecute this case, the District Attorney's office would reconsider its decision not to prosecute." J.A. 67.

There was no evidence that these offenses involved any flouting of military authority, posed a threat to any military installation, or involved any violation of military property.<sup>26</sup> In fact, there is no Coast Guard base or enclave, in the usual sense of those terms, in Juneau. Pet. App. B, note 1 to 20a.

The offenses committed here, involving sexual abuse of minors, are of the type traditionally prosecuted in

<sup>25</sup> The trial judge correctly found that: "[c]ivilian courts are present and available to adjudicate the offenses." J.A. 196.

<sup>26</sup> The trial judge correctly found that: "[a]ccused was not in uniform and in no way flouted military authority at the time of the alleged offenses"; "[n]one of the alleged offenses posed a threat to any military installation"; and "[n]one of the offenses resulted in any violation of military property." J.A. 196.

civilian courts.<sup>27</sup> It is clear from Appellate Exhibit X, J.A. 65, a message describing the results of the prosecution of two members of the Coast Guard, that the State of Alaska had actually prosecuted, and convicted, service-members for sexual abuse of minors. One of those convictions was so recent, at the time Appellee Exhibit X was prepared, that sentencing of the individual was still pending. J.A. 65.

The offenses did not implicate the military's interest in the security of persons or property on a military enclave, or the responsibility and authority of a military commander to maintain order within his command.<sup>28</sup> There was no threat of confrontation, between petitioner and the victims' fathers while they were assigned to the same unit, that would have an impact on the unit commander's responsibility for maintaining order. There was evidence that the fathers of the alleged victims were assigned to the same unit as petitioner, the Seventeenth District Office, at the time the offenses were committed, and evidence they became upset and angry when they learned of the allegations. However, the victims' fathers were not aware of the allegations while they were stationed with petitioner.

Chief Warrant Officer [CWO] Johnson was assigned to Coast Guard Headquarters in Washington, D.C., and Yeoman Second Class [YN2] Grantz was stationed at a unit in Baltimore, Maryland, when they learned of the allegations. J.A. 49, 107, and 123. Petitioner, meanwhile, had been transferred to a unit on Governors Island, New York. Because all of the parties were transferred before

<sup>27</sup> The trial judge correctly found that: "the alleged offenses are of the type traditionally prosecuted in civilian courts . . . ." J.A. 197.

<sup>28</sup> The trial judge properly found that: "[t]here is no essential interest of the military in the security of person or property on post in this case"; and "[n]o issue challenges the Commander's responsibility and authority to maintain order." J.A. 197.

any allegations were made, there was no impact from these offenses on the Seventeenth District Office. Petitioner's, and the victims' fathers', ability to perform their duties at the Seventeenth District Office was not affected.

The Alaska offenses did not have an impact on the Coast Guard community at Juneau.<sup>29</sup> There also was no impact from these offenses at the Coast Guard Base at Governors Island.<sup>30</sup> The offenses which petitioner com-

<sup>29</sup> TTC Truby testified as follows:

Q. Do you keep contact with anyone in Juneau?

A. Yes my wife does, we have friends that live there, I don't keep contact with them directly.

Q. Through contacts with your wife are you aware of any effect on the reputation, morale, military discipline of the command in Juneau?

A. No nothing was mentioned that I know of.

J.A. 89. CWO DeMarchi, another witness testified as follows:

Q. You correspond regularly with people in Juneau?

A. Yes sir, I do.

Q. Are you aware of any impact that these allegations made against Petty Officer Solorio have had on the Juneau community?

A. No sir, I am not.

J.A. 100.

The trial judge properly found that: "[t]here has been no demonstrated impact of the offenses on morale, discipline, the reputation or integrity of the Coast Guard in Juneau, the personnel assigned there, nor on military operations or missions." J.A. 197.

<sup>30</sup> The only direct evidence on the issue was the testimony of TTC Truby, and he testified as follows:

Q. You stated that you live on Governors Island in the BEQ?

A. Yes Barracks 513 sir.

Q. Prior to discussing this case with Mr. Couper [the Coast Guard prosecutor] and myself, had you heard anything about the allegations of child sexual abuse?

A. No sir, only that—like I said when I ran into Frank [Grantz, the father of one of the victims] I asked him what

mitted on Governors Island, which are not at issue here, are far more likely to have been responsible for any impact on Governors Island than the offenses committed thousands of miles away in Alaska, months before petitioner arrived on Governors Island.

The Alaska courts did not have a lessened interest, concern and capacity to vindicate the military disciplinary authority within its own community.<sup>31</sup> In fact, there really is no distinct Coast Guard community in Juneau. The Coast Guard personnel all live in, and are a part of, the civilian community. J.A. 48.

Moreover, although the issue of the interest of the Alaska courts in these offenses was contested, and there is some conflicting evidence, the facts support the conclusion that the Alaska courts did not have a lessened interest in these offenses. S/A Gary Smith testified that, even though petitioner and his victims had been transferred, the State of Alaska was continuing to investigate possible sexual child abuse offenses against the children of civilians in Juneau. J.A. 149. He testified that the State of Alaska was following up on a lead involving a child, apparently still in Alaska. J.A. 150. There was also evidence of the State's recent prosecution of members of the Coast Guard for similar offenses. *Supra*

was he doing here and he said it was an Article 32 hearing, I asked him what for and he got very teary eyed and I stopped.

Q. So until you had contact with people involved with this case you were aware of no effect on morale on Governors Island were you?

A. Impact from this case on morale on Governors Island?

Q. That's correct.

A. No sir, I was not aware of any allegations of any sort until then.

J.A. 89.

<sup>31</sup> The trial judge correctly found that: "[t]here has been no evidence suggesting a potential lessened interest concern or capacity of civil courts to vindicate the military's disciplinary interest in prosecuting these offenses." J.A. 197.



p. 29. The absence of the offender and the victims from the state may make prosecution somewhat more difficult, but it is not an insurmountable obstacle and it is one that prosecutors routinely face.<sup>32</sup>

The offenses did not injure relationships between the military and civilian community.<sup>33</sup> As has just been noted, *supra* p. 31, there is no distinct Coast Guard community in Juneau, and these offenses have not become public knowledge in Juneau.

Because there is no military base or enclave in Juneau, the victims here cannot be considered to be persons associated with the post. Moreover, as has been discussed above, *supra* p. 17, the dependent status of a victim alone has never been held to be sufficient to support court-martial jurisdiction. Finally, since the offenses did not occur on a military base, this case does not involve trying to draw a line between a posts military and nonmilitary areas.<sup>34</sup>

The facts of this case do not supply a basis for subject-matter jurisdiction. Therefore, this is not an appropriate case for the military to exercise more than its power to turn the petitioner over to the civil authorities. Petitioner has relied on the absence of facts to support court-martial jurisdiction, and not on a misreading of *O'Calla-*

<sup>32</sup> The Coast Guard Military Justice Manual, COMDTINST M5810.1A, Chapter 800, contains procedures for the delivery of Coast Guard personnel to civil authorities, including the situation where the servicemember is beyond the territorial limits of the requesting state.

<sup>33</sup> The trial judge correctly found that: "[t]here is no evidence that these alleged offenses were known by anyone in the community to have taken place, outside of law enforcement circles"; and "[n]o adverse impact on the reputation of the Coast Guard in Juneau has resulted from these incidents." J.A. 198.

<sup>34</sup> The trial judge correctly found that: "we do not have a case of inability to distinguish between the military from non-military area of a post or between the accused's on duty versus off-duty time while on post." J.A. 197.

han that would restrict courts-martial to purely military offenses. When a proper service-connection analysis is made, utilizing the *Relford* factors and considerations, it is clear that the Court of Military Appeals erred in holding that there was court-martial subject-matter jurisdiction in this case.

#### C. No Military Interest Has Been Demonstrated That Outweighs Petitioner's Interest In A Civilian Trial.

Petitioner submits that this Court's precedents require an *ad hoc* determination of service-connection based on the facts of each case and application of the *Relford* factors and considerations. But even if it were permissible to ignore the *Relford* criteria where the Government proves a distinct military interest in the offenses that cannot be adequately vindicated in civilian courts, the Government has failed to prove that here.

The trial judge gave appropriate consideration to the Government's arguments asserting factors that are not relevant or significant to service-connection, under *O'Callahan* and *Relford*. These arguments failed to persuade him that the Government had demonstrated a military interest that was greater than that of the civilian courts, or that could not be adequately vindicated in the civilian courts.

The impact of these offenses on the victims and their families would have been the same if the offender had been a civilian.<sup>35</sup> This shows that the impact was not of the type to create a distinct military interest in prosecuting these offenses. If the impact on the victims and their families had been proven to be significantly different because the offender was in the Coast Guard, or if the impact could only have been produced by someone in the Coast Guard, there might have been grounds for finding

<sup>35</sup> The trial judge correctly found that the impact of these offenses was "no different than that which would have been produced by [a] civilian perpetrator." J.A. 197.



that there was a distinct military interest in prosecuting these offenses, even though the impact on the service was remote and indirect. However, since the impact on the victims and their families would have been the same if the offender had been a civilian, there was no distinct military interest, and the civilian courts could adequately vindicate any military interest. *See supra* note 17.

The Coast Guard Family Advocacy Program specifically excludes child abuse situations like those in this case from its scope. J.A. 56. Inferences can be drawn, however, from the Program's treatment of intra-family child abuse that show that there was no distinct military interest in these offenses, and that any military interest could be adequately vindicated in civilian courts.

In the intra-family child abuse situations, which are within the scope of the Family Advocacy Program, the Coast Guard has specified that local law should govern and, therefore, set the standards for behavior. J.A. 58. The Family Advocacy Program includes a policy of relinquishing federal jurisdiction so that local child abuse law would apply on Coast Guard installations. *Id.* The Coast Guard's reliance on local law in these instances supports the conclusion that the Coast Guard's interest in child sexual abuse situations is not distinct from that of civil authorities, and that the Coast Guard's interest can be adequately vindicated in civil courts.

There was no impact on the unrestricted transfer of personnel, and in fact, all involved parties have been transferred without restriction. Captain Caprio testified that if a servicemember was transferred to a place where there were no Coast Guard facilities available to provide counseling for a dependent victim of sexual abuse, there would more than likely be facilities in the community. J.A. 141. CWO Johnson testified that his family was receiving counseling from a civilian organization, State of Virginia Family Counseling. J.A. 108. He also testified that the counseling program "could take as much as a year or more." J.A. 112. YN2 Grantz testified that his family was receiving counseling from the Sex Crisis

Abuse Center in Annapolis, Maryland, an Anne Arundel County program. J.A. 124. He testified that the counselor estimated that counseling might last six months to a year. J.A. 125.

Since, both the Johnson and Grantz families are currently being counseled in civilian rather than Coast Guard facilities, and such facilities are likely to be available in any community to which they may be transferred, there is no impact on their availability for unrestricted transfer. Furthermore, CWO Johnson was transferred in 1983, J.A. 102, and YN2 Grantz was transferred in 1984, J.A. 120. Even if the counseling were to take two years rather than the one year that was estimated in both cases, the Johnson and Grantz families will have completed their counseling before they have completed a normal four year tour of duty at their current duty stations.

Cases suggesting that assignment to the same unit is a significant factor in determining impact on the service can be distinguished on their facts from this case, and certainly, no prior case has held that this factor alone is sufficient to establish service-connection. For example, in *United States v. White*, 1 M.J. 1048 (NC.M.R. 1976), the "dependent" wife and victim, was in the Navy, as was her husband and the accused. The accused was not only a member of the victim's husband's unit, but was in the same duty section. Moreover, the accused first met and accosted the victim on base, he formed the intent to commit a crime against the victim on base, and the accused was able to learn that the victim's husband would not be home at the time he sexually assaulted her because of his military status and duty assignment.

There were many factors in *White* that led the court to find that the military relationships were significant. It would be a great oversimplification of the analysis there to suggest that membership in the same unit, by itself, is a significant factor.

It would be incorrect to argue that where there has been a failure to prove any actual effect on morale and discipline, a decline in morale or damage to service reputation can be found to be a natural consequence of certain offenses. Inferences based solely on the nature of the offense cannot support service-connection if the test is to continue to be based on the facts of each case rather than *per se* rules. Moreover, if such an inference can be justified in some cases, this is not such a case.

The victims in this case were not servicemembers, and there are no other facts in this case sufficient to support service-connection. There is only evidence that these alleged offenses have had an effect on the victims' fathers, who are servicemembers. The Coast Guard has attempted to bootstrap this single factor into grounds for finding service-connection by asserting every imaginable impact stemming from the effect of these offenses on the victims and their fathers. In fact, however, there has been only a remote and indirect impact on the Coast Guard, and any military interest in these offenses could be adequately vindicated in the civilian courts.

The record shows that the facts of this case fail to demonstrate a military interest that outweighs the accused's interest in a civilian trial. Therefore, the decision of the Court of Military Appeals should be reversed because the facts cannot support its finding that the offenses are service-connected.

### III. THIS COURT SHOULD NOT HESITATE TO ENFORCE ITS PRECEDENTS WHICH PROPERLY LIMIT COURT-MARTIAL JURISDICTION.

#### A. Service-connection Has Evolved Into A Well-defined Principle Of Law.

The most serious criticism of the *O'Callahan* decision came immediately after the case was decided, and suggested that the case would lead to confusion and uncertainty about the limits of military subject-matter

jurisdiction. Justice Harlan, dissenting in *O'Callahan*, stated:

the Court suggests no general standard for determining when the exercise of court-martial jurisdiction is permissible. . . . Congress and the military are at least entitled to know with some certainty the allowable scope of court-martial jurisdiction. Otherwise, the infinite permutations of possibly relevant factors are bound to create confusion and proliferate litigation over the jurisdictional issue in each instance.

*Id.* at 284. He concluded, "the Court has thrown the law in this realm into a demoralizing state of uncertainty." *Id.* at 275.

In *Relford*, this Court acknowledged that the *O'Callahan* decision had met with some generally critical comments including those of, then, Professor Everett. *Id.* at 357. The Court noted that the criticism expressed concern, as had Justice Harlan's dissent, about the confusion that *O'Callahan* might cause.<sup>36</sup> *Id.* Therefore, in *Relford* this Court clearly set out its analysis of the service-connection issue, and that analysis has served as a model which has been followed by lower courts for more than fifteen years. That service-connection analysis has eliminated the potential for confusion in this area of the law by limiting the "infinite permutations of possibly relevant factors" to the twelve "*Relford* factors" and nine additional considerations.

By Executive Order, the law of *O'Callahan* and *Relford*, has been incorporated into the regulations that govern courts-martial. Rule 201(b), R.C.M., MCM 1984, states that courts-martial only have jurisdiction over offenses that are subject to court-martial jurisdiction. *Supra* p.

<sup>36</sup> Chief Judge Everett wrote in his article, *O'Callahan v. Parker—Milestone or Millstone in Military Justice*, 1969 Duke L.J. 853, "[c]riticism of the majority opinion would be more muted if it had given a clearer test for deciding when military jurisdiction exists." *Id.* at 869.



2. Rule 203, R.C.M., MCM 1984, makes any offense under the Uniform Code of Military Justice subject to court-martial jurisdiction, to the extent permitted by the Constitution. *Id.* The Discussion and Analysis of Rule 203 were published by the Department of Defense in conjunction with the Department of Transportation. They are nonbinding, but they are entitled to great deference and weight because they set forth the drafters' views of the state of the law of subject-matter jurisdiction.

The Discussion distills the law of service-connection into five types of offenses where the balance of *Relford* factors and considerations supports service-connection, and two exceptions where subject-matter jurisdiction will be found without applying the service-connection test. Pet. App. C and D, 46a-54a. Offenses that do not fit into the five types or the two exceptions are not service-connected.

The exceptions are for offenses committed overseas and petty offenses. Pet. App. C, 47a-48a. The five types of service-connected offenses are: "military offenses"; "offenses on a military installation"; "drug offenses"; "offenses involving military status and the flouting of military authority"; and, offenses committed in time of war. *Id.* at 46a-47a.

The Discussion of Rule 203 shows that when MCM 1984 was published in July 1984, service-connection had evolved into a principle of law that was well-defined by the simple guidelines described there. Consistent application of this Court's service-connection test provided a high degree of certainty as to the limits of court-martial subject-matter jurisdiction. Military prosecutors and accuseds, alike, could predict quite accurately which offenses were service-connected and which were not.

There was little use to the accused in litigating subject-matter jurisdiction over cases involving offenses committed overseas, petty offenses, military offenses, offenses occurring on-base and offenses committed in time of war.

Similarly, there was little use in trying to court-martial a servicemember for an off-base offense unless it involved drugs, use of military status to commit the offense, flouting of military authority, or unless the offense was directly related to significant on-base conduct or impacts.

As the discussion of the facts of this case, *supra* pp. 23-36, shows, the offenses which were dismissed by the trial judge here do not fit into any of the types of service-connected offenses. There is no hint in either the Discussion or the Analysis of Rule 203 that the dependent status of a victim is, by itself, sufficient to establish service-connection. See Pet. App. C and D, 43a-54a. Therefore, the Court of Military Appeals' decision, not only fails to follow this Court's decisions in *O'Callahan* and *Relford*, it conflicts with the settled law of subject-matter jurisdiction.

**B. This Court's Precedents Strike The Correct Balance Between The Servicemember's Interest In A Civilian Trial And The Military Interest In Discipline.**

The right to a civilian trial for a civilian offense is an important right for a military accused. On the other hand, there is a legitimate need for discipline in the military. This Court has struck the proper balance between the servicemember's interest in a civilian trial and the military's interest in discipline. The servicemember's right to a civilian trial is protected, but it is limited, so it does not interfere with the legitimate need for discipline in the military which the service-connection test, set out by this Court in *O'Callahan* and *Relford v. Commandant*, 401 U.S. 355 (1971), fully protects. More than fifteen years after *O'Callahan* was decided military morale and discipline are as high as they have ever been.

This Court observed in *O'Callahan* and *Relford* that Article I, § 8, cl.14 and the Fifth Amendment allow Congress to create military courts which need not provide all the procedural safeguards essential to an Article III



court. On the other hand, the Court found that for offenses not subject to Congress' authority over national defense and military affairs, Article III, § 2, cl.3, the Sixth Amendment, and possibly the Fifth Amendment, guaranty the right to trial in a civilian court. In *O'Callahan* this Court held that offenses that are not service-connected are not within Congress' authority over national defense and military affairs, or at least that it is constitutionally inappropriate for Congress to exercise that authority over such offenses. *Id.* at 272-273. Therefore, such offenses cannot be proscribed by the Uniform Code of Military Justice, 10 U.S.C. §§ 801 *et seq.*, or tried by court-martial. *O'Callahan*, 395 U.S. at 262.

*O'Callahan* and *Relford* were properly decided because there has been no appreciable cost in terms of military discipline for the servicemember's right to a civilian trial for civilian offenses. This Court has clearly stated that it intends the service-connection test to balance the constitutional rights of servicemembers against the military's interest in trying the case at a court-martial. While acknowledging that the special needs of the military justify a separate military justice system, the Court recognized that "expansion of military discipline beyond its proper domain carries with it a threat to liberty." *O'Callahan v. Parker*, 395 U.S. 258, 265. Moreover, the Court observed "the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'" *Id.* (citing *Toth v. Quarles*, 350 U.S. 11, 22-23 (1955)).

**C. It Is Proper For This Court To Exercise The Jurisdiction Congress Has Recently Given It Over The Court Of Military Appeals.**

In its most recent decision involving servicemembers and their relations with their military commanders, *Goldman v. Weinberger*, — U.S. —, 106 S.Ct. 1310 (1986), this Court has deferred to the services' assertions

of military necessity and declined to probingly test the military's judgment concerning the relative importance of the military's interest in uniformity as compared to the servicemember's free exercise right. That deference is based on this Court's inability to predict the impact that any new limitation on military authority may have upon discipline, and respect for Congress' and the President's authority over national defense and military affairs. *Goldman*, at 1313.

Proper decision of this case, however, does not require any new limitations on military authority, neither does this Court have to speculate about the impact of its decision on military discipline. The limits on court-martial subject-matter jurisdiction were set out more than fifteen years ago in the *O'Callahan* and *Relford* decisions, and as has been pointed out earlier, those decisions have not had an appreciable cost in terms of military discipline. *Supra* pp. 39-40.

Moreover, in *O'Callahan*, this Court found that prosecution of offenses that are not service-connected is beyond the scope of Congress' authority over national defense and military affairs, or is at least a constitutionally inappropriate use of that authority. Any remaining doubts about the propriety of this Court's subjecting the decision below to rigorous appellate review must give way to the recent judgment of Congress in extending this Court's jurisdiction, for the first time, to cases on appeal from the Court of Military Appeals. See Military Justice Act of 1983, Pub.L.No. 98-209, § 10, 97 Stat. 1393, 1405 (1983).

This Court's precedents clearly require the military to support its assertions of subject-matter jurisdiction with something more than its views, perceptions or professional judgments of what offenses should be prosecuted by court-martial to promote military discipline. Therefore, the standard of review here is clearly different from the standard which was applied in *Goldman*. The higher standard which the military must meet before it can con-

vict and punish a servicemember at a court-martial, should not be confused with the lesser standard that this Court has held will support administrative actions which burden the servicemember's free exercise rights. This Court should not hesitate at all to enforce its decisions in *O'Callahan* and *Relford*.

**IV. THE COURT OF MILITARY APPEALS' DECISION SHOULD BE REVERSED BECAUSE IT DEPRIVES PETITIONER OF DUE PROCESS BY DEPARTING FROM ITS PRECEDENTS TO EXPAND COURT-MARTIAL JURISDICTION AND APPLYING THAT MORE EXPANSIVE INTERPRETATION TO PETITIONER IN THE SAME CASE.**

The Court of Military Appeals' decision should be reversed because it departs from its own precedents and applies a more expansive subject-matter jurisdiction test to petitioner. Application to petitioner, in the same case, of this interpretation which expands the reach of the Uniform Code of Military Justice, violates Fifth Amendment due process. *Marks v. United States*, 430 U.S. 188 (1977); *Bowie v. City of Columbia*, 378 U.S. 347 (1964).

In *Marks*, this Court held that the application of a decision expanding the constitutional reach of a statute, that proscribed conduct in sweeping language, to conduct that occurred before the decision was improper. In that case, the constitutional limits on statutes proscribing obscenity were relaxed in a decision rendered after the defendants had allegedly transported obscene material in interstate commerce. The application of the more expansive standard for obscenity to the defendants there was held to violate the Due Process Clause because it would have the same effect as an *ex post facto* law.

Here, the Court of Military Appeals has relaxed the constitutional limits on the reach of the Uniform Code of Military Justice, and in particular Articles 80, 128 and 134, 10 U.S.C. §§ 880, 928 and 934, as they relate to off-base sex offenses against civilian dependents. Those

statutes proscribe conduct of servicemembers in sweeping language that this Court has confined within constitutional limits in *O'Callahan* and *Relford*. This decision is contrary to the Court of Military Appeals' own precedents which held that conduct like that involved here was beyond the reach of the Uniform Code of Military Justice. *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

The Court of Military Appeals, however, did not even address the due process issue in this case. The Court merely stated that:

Admittedly, our precedents involving off-base sex offenses against civilian dependents of military personnel would point to a different conclusion. See, e.g., *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). However, as we made clear in *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), which concerned drug activity, some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience. [Footnote omitted].

*United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986).

The comment in a case concerning drug activity that "some" earlier opinions on service-connection need to be reexamined certainly cannot have satisfied the petitioner's right to fair warning about the reach of military statutes proscribing sex offenses. For one thing, the most significant rationale for the *Trottier* decision was that, because of their impact on military readiness, "it is necessary and proper in today's world that court-martial jurisdiction over most drug offenses be invoked as a proper exercise of the war powers." *United States v. Trottier*, 9 M.J. 337, 352 (C.M.A. 1980). There has been



no suggestion that off-base sex offenses similarly affect military readiness or are otherwise related to authority stemming from the war power. *See supra* pp. 26-27.

Moreover, the expansion of the reach of the Uniform Code of Military Justice to these offenses deprives petitioner of constitutional trial rights that even Congress could not retroactively strip from him. Such a law would be an *ex post facto* law. If Congress cannot pass such a law, the Court of Military Appeals cannot achieve the same result by judicial construction. *Bowie v. City of Columbia*, 378 U.S. 347, 353-354 (1964). Of course, Congress has not attempted to legislatively expand military jurisdiction over off-base sex offenses, even prospectively.

The Government argues in its Brief in Opposition that petitioner was not deprived of due process, asserting that there is no due process problem so long as petitioner was aware that his conduct was criminal. Opp. at 19. The issue, however, is not whether petitioner was on notice that his conduct was criminal in the abstract or under state law, but whether he was on notice that a court-martial had jurisdiction to try the offense. Congress cannot "make a federal crime out of acts of a defendant which prior to that time had not been federal crimes, but acts punishable under state law." *Woxberg v. United States*, 329 F.2d 284, 293 (9th Cir. 1964). *Bowie* and *Marks* have held that a court cannot, by reinterpreting the law, do in effect what the *ex post facto* clause prohibits the legislature from doing, because that violates the accused's right to due process. *United States v. Goodhiem*, 561 F.2d 1294, 1297 (9th Cir. 1981).

While conduct like that of which petitioner was convicted may, in some circumstances, be an offense under the Uniform Code of Military Justice, there is no court-martial subject-matter jurisdiction over such conduct unless it is service-connected. *O'Callahan v. Parker*, 395 U.S. 258 (1969); *Relford v. Commandant*, 401 U.S. 355 (1971). Prior case law gave no notice to petitioner that a court-martial would have jurisdiction to try these of-

fenses; rather they held that such conduct was beyond the reach of court-martial jurisdiction. *Supra* p. 43. Whether the accused was on notice that his acts were offenses under the Uniform Code of Military Justice is crucial because trial by court-martial deprives an accused of important constitutional rights which are guaranteed in civilian courts.

The Government, in its Brief in Opposition, utterly failed to address the point that the establishment of federal jurisdiction, after the fact, violates due process. *United States v. Juvenile*, 599 F. Supp. 1126, 1131-1132 (D. OR 1984). Petitioner has not claimed that due process prevents his being tried altogether. What it does require is that he be tried by the civilian court (in this case an Alaska state court) that had jurisdiction over the offenses at the time they were committed, rather than the court-martial to which jurisdiction was extended by the decision below, after the offenses. *Id.* at 1131-1132.

*Juvenile* involved a proceeding against a minor in a federal district court. The defendant attacked federal jurisdiction because of improper certification under 18 U.S.C. § 5032. The Government argued that even if its original certification was improper, its amended certification asserting jurisdiction based on an amendment to 18 U.S.C. § 5032, made after the acts involved in the proceeding occurred, was proper. The Court, however, held that the "retrospective establishment of federal jurisdiction violates the *ex post facto* clause." *Juvenile* 599 F.Supp. at 1131. It found that retrospective application of the amended statute to impose federal jurisdiction where it had not existed would disadvantage the juvenile defendant and defeat his defense based on lack of federal jurisdiction. *Id.* at 1131-1132.

Similarly here, the Court of Military Appeals' retrospective application of its expansive interpretation of the reach of the Uniform Code of Military Justice, to the offenses committed by petitioner, has disadvantaged him



by depriving him of a trial in a civilian court, and by defeating his defense of lack of court-martial jurisdiction. This has the effect of an *ex post facto* law and, therefore, violates petitioner's fifth amendment due process rights. For that reason, the decision of the Court of Military Appeals should be reversed.

### CONCLUSION

The judgment of the Court of Military Appeals affirming the judgment of the Coast Guard Court of Military Review should be reversed, and the trial judge's ruling dismissing the Alaska offenses for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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# **In the Supreme Court of the United States**

OCTOBER TERM, 1986

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RICHARD SOLORIO, PETITIONER

v.

UNITED STATES OF AMERICA

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS

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BRIEF FOR THE UNITED STATES

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58pp

### QUESTIONS PRESENTED

1. Whether the offense charged against petitioner—sexual assault on the dependent children of fellow servicemen—is sufficiently “service connected” to authorize a prosecution in the military courts.

2. Whether petitioner’s court-martial violated the Due Process Clause because petitioner was denied fair warning that he was subject to prosecution in the military system.



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## In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1581

RICHARD SOLORIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

## OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-17a) is reported at 21 M.J. 251. The opinion of the Coast Guard Court of Military Review (Pet. App. 18a-42a) is reported at 21 M.J. 512.

## JURISDICTION

The judgment of the Court of Military Appeals was entered on January 27, 1986. The petition for a writ of certiorari was filed on March 26, 1986, and was granted on June 16, 1986. The jurisdiction of this Court rests on 28 U.S.C. (Supp. II) 1259(3).

## STATEMENT

1. From October 1980 to June 1984, petitioner, a petty officer on active duty in the Coast Guard, served on the staff of the Commander of the Seventeenth Coast Guard

District in Juneau, Alaska (J.A. 47-50). There is no "base" or "enclave" where Coast Guard personnel live and work in Juneau, and virtually all Coast Guard military personnel reside in the civilian community (Pet. App. 20a-21a n.1). Petitioner lived in a privately owned home (*id.* at 20a). His next door neighbor until June 1983 was Larry Johnson, a Coast Guard enlisted man with a young daughter who turned ten years old in March 1982 (J.A. 53, 102-104). Living nearby was another Coast Guard petty officer, Frank Grantz, who also had a young daughter the same age (*id.* at 51, 120-121). The girls' fathers were assigned to the same command as petitioner and worked in the same building (*id.* at 102-104, 120-121). The two young girls frequently visited petitioner's house (*id.* at 51-55, 106). During those visits, petitioner committed numerous acts of sexual abuse, including fondling, indecent assault, and several attempted rapes of one of the girls. This pattern of abuse continued over a two-year period, while the girls were between ten and 12 years of age, until petitioner was reassigned to the Coast Guard base at Governors Island, New York (Pet. App. 20a-22a).

Following petitioner's transfer, he sexually abused the young daughters of two other fellow Coast Guardsmen in government quarters on the base (Pet. App. 22a). The Alaska crimes first came to light during the investigation of those offenses (Pet. App. 21a; J.A. 107, 123). The State of Alaska was contacted to determine whether it intended to prosecute petitioner for those crimes. The district attorney's office in Juneau responded that the State would defer prosecution to the Coast Guard, for several reasons: because petitioner and his victims were connected to the Coast Guard, because they had been transferred from Alaska, because the crimes had been investigated by Coast Guard personnel, and because similar military charges were pending in New York (Br. in Opp. App. 1a-3a).

2. The Governors Island commander thereafter convened a general court-martial. Petitioner was charged

with 21 specifications of sexual child abuse in Alaska and New York, in violation of Articles 80, 128, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 928, and 934. Before trial, petitioner moved to dismiss the 14 Alaska charges on the ground that the court lacked jurisdiction because the offenses were not "service connected" under this Court's decisions in *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971) (J.A. 16).

Prior to trial, the court-martial judge conducted an evidentiary hearing on the motion. During the hearing, the government introduced evidence of the damaging effect of the crimes on the young girls who were abused (J.A. 112, 119, 123-125). In addition, the victims' fathers testified about the personal impact of the crimes on them. The evidence showed that the fathers were emotionally shaken; they could not concentrate on their work; and they lost their trust of fellow Coast Guardsmen. As a result of the crimes, the performance by these otherwise superior servicemen deteriorated significantly (*id.* at 108-109, 112, 124-127). The testimony concerning the emotional effect of the crimes on the victims and their families was supported by expert opinion (*id.* at 135-140). The young girls and their servicemen parents required extensive psychological counseling, the costs of which imposed a financial burden on their families (*id.* at 49-50, 107-108, 112, 124-125). Evidence was also adduced concerning the Coast Guard's good reputation in Juneau and the resulting benefits, including job opportunities, that Coast Guard family members enjoy in that community (*id.* at 80-81, 88, 96-97). Testimony was presented that public awareness of petitioner's crimes would have an adverse effect on that reputation, at least in the short run, risking the loss of benefits presently enjoyed by Coast Guard personnel in Juneau (*id.* at 82, 93, 97, 101).

After hearing the evidence, the trial judge granted the motion to dismiss. He concluded that the Alaska offenses



were not sufficiently "service connected" to be triable in the military criminal justice system (J.A. 195-200; see also Pet. App. 62a-63a).

3. The government appealed the dismissal of charges to the Coast Guard Court of Military Review, which reversed the trial judge's ruling and reinstated the Alaska charges (Pet. App. 18a-42a). The court found that several of the trial judge's findings were unsupported by the evidence and were erroneous as a matter of law (*id.* at 28a-35a).<sup>1</sup> The court also found that the trial judge had "overlooked the possible unique and distinct effect" on the military of the inability to court-martial a serviceman for the offenses charged against petitioner (*id.* at 33a-34a). The court concluded that "as a matter of law the Coast Guard's interest in deterring these offenses is distinct from and greater than that of the Alaskan authorities" (*id.* at 33a). Relying on the letter from the Alaska district attorney's office, the court found that the civilian authorities had a diminished interest in prosecuting petitioner, since he and the victims had moved away from the state (*id.* at 34a-35a).

In determining whether the crimes were service connected, the court relied primarily on two criteria articulated in *Relford v. Commandant*, *supra*: the responsibility of a military commander to maintain order in his command, and the need for court-martial jurisdiction when civilian courts have a reduced incentive or ability to vindicate that authority (Pet. App. 36a-38a). See 401 U.S. at 367-368. The court concluded that petitioner's offenses "by their very nature contained within them the potential for a disrupting effect on good order and discipline" (Pet. App. 32a) and "directly impacted upon good order, discipline, morale and welfare of servicemembers and their families" (*id.* at 33a). The

<sup>1</sup> Petitioner often refers to the trial judge's findings (Br. 3, 10, 14, 23-24, 26-32), but he fails to note that the court of military review found that several were incorrect as a matter of law (Pet. App. 32a-35a).

court also found that, although the offenses were not committed within the confines of a military base, they were nonetheless "violations against persons associated with one particular Coast Guard command" (*id.* at 35a). It was appropriate, the court held, for the military to be concerned with the security of personnel who make up a command, even when the members of the command do not live and work on a discrete military installation (*ibid.*). The court emphasized that the similarity between the Alaska and New York offenses "presents a pattern of behavior which poses a real threat to families" in the vicinity of the New York Coast Guard facility (*id.* at 36a-37a), and that the commander of that facility had a "compelling" interest in resolving all the charges against petitioner swiftly (*id.* at 37a). The "paramount interest of the Coast Guard" was evidenced by the fact that all the parties were still members of "the Coast Guard community" (*id.* at 37a-38a). Accordingly, the court held that the Alaska child abuse charges were "service connected" under *O'Callahan* and *Relford*.

4. Petitioner thereafter sought review by the Court of Military Appeals. After granting review, that court also concluded that the Alaska offenses were service connected (Pet. App. 1a-17a). The Court of Military Appeals noted that not every off-base offense against a servicemember's dependent is necessarily service connected (*id.* at 12a), but it found that these crimes were sufficiently service connected to justify prosecution by court-martial, since "sex offenses against young children \* \* \* have a continuing effect on the victims and their families and ultimately on the morale of any military unit or organization to which the family member is assigned" (*ibid.*). In so ruling, the Court of Military Appeals relied on a number of factors (*id.* at 10a-16a): the emotional and financial impact on the servicemember fathers and the victims; the effect on the morale and discipline of the military unit, both where the parties were stationed when the offenses occurred, and where the

parties might thereafter serve; the reduced interest of civilian authorities in prosecution due to the transfer of the victims and petitioner from Alaska; and the benefits to petitioner, the victims, and the Coast Guard from trying the Alaska off-base and New York on-base offenses together. The court therefore held that petitioner could be court-martialed on the Alaska child abuse charges (*id.* at 16a).<sup>2</sup>

### INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution empowers Congress "[t]o make Rules for the Government and Regulation of the land and naval Forces" (Art. I, § 8, Cl. 14). That authority includes the power to define crimes and to set their punishments. *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 246 (1960). The Grand Jury Clause of the Fifth Amendment also expressly excepts "cases arising in the land or naval forces" from its terms. More than a century ago, this Court held that Congress may provide for the court-martial of servicemembers for crimes, and that neither the Fifth Amendment right to indictment by a grand jury nor the Sixth Amendment right to trial by a petit jury is applicable when a crime arises in the land or naval forces. *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79, 82 (1858). Exercising its plenary authority, Congress has empowered courts-martial to try servicemembers for any crime defined by the Uniform Code of Military Justice. Art. 2, UCMJ, 10 U.S.C. 802. The court-martial convened below therefore possessed statutory authority to try petitioner on the Alaska child abuse charges.

<sup>2</sup> After the Court of Military Appeals and the Chief Justice denied petitioner's request for a stay of the proceedings, the court-martial reconvened on February 18, 1986. On March 11, petitioner was convicted on eight of the 14 Alaska specifications and on four other specifications of sexual child abuse. He was sentenced to one year's confinement, to a reduction in pay-grade, and to a bad conduct discharge. His conviction is currently under review by the convening authority, pursuant to Art. 60, UCMJ, 10 U.S.C. 860.

The question in this case is whether that tribunal may constitutionally exercise its statutory authority. Historically, a serviceman could be prosecuted by a court-martial for any offense defined by Congress. But in 1969, this Court held in *O'Callahan v. Parker*, 395 U.S. 258, that a court-martial may not exercise its jurisdiction over a servicemember unless, on the facts of the case, the offense has a sufficient impact on military interests that it can be considered "service connected" (*id.* at 267). As the Court has since explained, a variety of considerations are relevant to this question. *Relford v. Commandant*, 401 U.S. 355, 365, 367-369 (1971). The ultimate determination focuses on three related inquiries: "[1] the impact of an offense on military discipline and effectiveness, \* \* \* [2] whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and \* \* \* [3] whether the distinct military interest can be vindicated adequately in civilian courts." *Schlesinger v. Councilman*, 420 U.S. 738, 760 (1975). Resolving the issue of "service connection" involves "matters of judgment that often turn on the precise set of facts in which the offense has occurred," and is a subject as to which "the expertise of military courts is singularly relevant" (*ibid.*).

Under these standards, we submit that the military appellate courts properly concluded that petitioner's crimes are "service connected" and thus can be subject to court-martial. If the Court disagrees with that submission, however, we urge the Court to reconsider and overrule its decision in *O'Callahan* in order to return to Congress the authority to define court-martial jurisdiction for all persons who are members of the armed forces.

I. The military appellate courts properly found that a variety of factors support the exercise of court-martial jurisdiction in this case. The fact that the victims are military dependents is an important factor, even if it is not dispositive. Crimes committed by a servicemember against a military dependent have a direct and negative



effect on military discipline and effectiveness, particularly when the crimes are committed by a member of the same military command as the victim's parent and in the same community where the parties live and work. Furthermore, petitioner was charged not only with the off-base offenses in Alaska, but also with similar on-base crimes in New York, as to which there was no question of court-martial jurisdiction. Permitting the off-base offenses to be tried together with the on-base charges contributes to judicial economy and reduces the burdens on the military, the civilian court system, the servicemember defendant, and the victims. In addition, the State in this case had a reduced interest in prosecuting petitioner for his offenses, since he and his victims had been transferred from Alaska at the time the offenses were discovered.

Trying petitioner in the military system would not violate his due process right to fair notice that his conduct was subject to prosecution. As a threshold matter, petitioner failed to raise this issue in the lower courts, and he therefore has not preserved the issue for review in this Court. In any event, petitioner's claim is invalid on the merits, because his conduct was unlawful both under the Uniform Code of Military Justice and under state law. He cannot claim to have reasonably relied on the procedural bar of "service connection" to ensure that he would not be prosecuted in the military system, particularly in light of the clear indication by the Court of Military Appeals that it regarded the question of service connection to be an open one with respect to many off-base offenses after this Court's decision in *Relford v. Commandant*, *supra*.

II. If the Court concludes that the *O'Callahan* decision would not permit this case to be tried by the military courts, we submit that *O'Callahan* should be reconsidered. For several reasons, the "service connection" requirement that was adopted for the first time in *O'Callahan* should be rejected.

*First*, *O'Callahan* was a clear departure from prior decisions, which had consistently recognized that military status alone was sufficient to allow a serviceman to be court-martialed for any offense defined by the Uniform Code of Military Justice. *Second*, the primary reason given in *O'Callahan* for the service-connection requirement—the failure of the military justice system to safeguard the rights of defendants—has been significantly undermined by recent changes in the military justice system. A serviceman defendant now enjoys procedural safeguards that make the military system comparable in many important respects to civilian criminal justice systems. *Third*, since *O'Callahan* this Court has emphasized that Congress has the primary responsibility for balancing the needs of the military and the rights of servicemen, and that professional military judgments concerning discipline and effectiveness are entitled to great deference. The policy determination whether a particular serviceman and a particular offense should be subject to court-martial is best made by Congress and the military, not by the courts. *Fourth*, the service-connection requirement has proved confusing and burdensome in practice, because there is no textual or historical benchmark that can be used to guide the inquiry. In sum, Congress ought to be entitled to exercise its historic authority to define the scope of court-martial jurisdiction, and the military should not be required to defend Congress's judgment in each case.



## ARGUMENT

### I. PETITIONER CAN BE COURT-MARTIALED FOR THE OFF-BASE COMMISSION OF SEXUAL ASSAULT ON A MILITARY DEPENDENT

#### A. The Alaska Off-Base Child Abuse Offenses Are Service Connected Within The Meaning Of *O'Callahan* v. *Parker*

In *O'Callahan* v. *Parker*, 395 U.S. 258 (1969), this Court held that an off-base sexual assault on a civilian with no connection to the military was not a "service-connected" offense. Two years later, in *Relford* v. *Commandant*, 401 U.S. 355 (1971), the Court held that an on-base sexual assault was clearly service connected, and could properly be tried by court-martial. As this Court noted in *Relford*, the *O'Callahan* case "marks an area, perhaps not the limit, for the concern of the civil courts, and where the military may not enter" (401 U.S. at 369). The *Relford* case, the Court added, "marks an area, perhaps not the limit, where the court-martial is appropriate and permissible. What lies between is for decision at another time" (*ibid.*). This case lies between *Relford* and *O'Callahan*. What this Court must decide is whether the military courts properly determined that the special military interest in this case is of sufficient magnitude to justify the exercise of court-martial jurisdiction.

In seeking to provide guidance to the lower courts, this Court in *O'Callahan* and *Relford* identified some of the considerations that bear on the question whether a particular offense is sufficiently service connected to be triable by court-martial. In *O'Callahan*, the Court pointed out that the only connection between the offenses and the military was the active duty status of the defendant. The offense occurred at a time when the defendant was properly absent from his military base; the victim was a civilian unconnected to the military; and the crime did

not involve "the flouting of military authority, the security of a military post, or the integrity of military property" (395 U.S. at 273-274). In *Relford*, the Court focused on a number of factors that distinguished that case from *O'Callahan*, particularly the fact that the offense occurred on a military base. See 401 U.S. at 367-369.

It is clear from the opinions in *O'Callahan* and *Relford* that the factors the Court relied on in those cases were not intended to be exclusive. As the Court observed in *Relford*, the special military interest in prosecuting on-post offenses committed by servicemen leads to the conclusion that an offense committed by a serviceman against a person or property on a military base is *per se* "service connected," but that does not mean that an offense committed off the base is necessarily beyond the jurisdiction of the military justice system. 401 U.S. at 369. In the subsequent decision in *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), the Court once again made it clear that the factors relied upon in *O'Callahan* and *Relford* were not meant to be exclusive. The Court there characterized the "service connection" inquiry as turning on "[1] the impact of an offense on military discipline and effectiveness, \* \* \* [2] whether the military interest in deterring the offense is distinct from and greater than that of civilian society, and \* \* \* [3] whether the distinct military interest can be vindicated adequately in civilian courts." 420 U.S. at 760. These questions, the Court added, "are matters as to which the expertise of military courts is singularly relevant" (*ibid.*).

1. The primary factor on which the military appellate courts relied in finding that petitioner's Alaska offenses were service connected was that both victims were the dependents of fellow Coast Guardsmen assigned to the same command as petitioner (Pet. App. 10a, 32a-33a). Petitioner complains that the military courts should not have given weight to that factor (Br. 13-17). In fact, however, the status of the victim as a military dependent

has always been significant in determining whether a crime is service connected. Both the majority and the dissent in *O'Callahan v. Parker* recognized that court-martial jurisdiction historically extended to crimes against a person associated with a military installation. 395 U.S. at 274 n.19; *id.* at 278 (Harlan, J., dissenting) (both citing the same passage from W. Winthrop, *Military Law and Precedents* (2d ed. 1896)). *Relford* also called attention to the fact that the defendant's victims were relatives of servicemen. 401 U.S. at 366. And the factors summarized in *Schlesinger v. Councilman*—particularly the impact of the offense on military discipline and the greater interest of the military in deterring the offense—are plainly implicated when the victim of the crime is a military dependent. Although the Court of Military Appeals did not rely solely on the fact that petitioner's victims were military dependents, we believe that crimes against military dependents have such a direct, pervasive, and adverse effect on morale, discipline, and military readiness that they could be deemed service connected as a matter of law.

The case for characterizing crimes against military dependents as service connected is a compelling one. The armed forces have a substantial interest in the welfare of military dependents. The military frequently allows a servicemember's family to accompany him on assignments either within the United States or overseas. This policy has a direct, positive effect on recruitment, morale, and efficiency of the armed forces, and those benefits are the same whether a serviceman and his family live on or off the military post. Congress recently recognized "the importance of the military family to the readiness and morale of our forces" (131 Cong. Rec. S10354 (daily ed. July 30, 1985) (Sen. Kennedy)) by enacting the Military Family Act of 1985, Pub. L. No. 99-145, 99 Stat. 678 *et seq.*, which offers a variety of benefits to military

dependents.<sup>3</sup> Events that affect military dependents therefore directly affected military interests.

The sexual abuse of children, in particular, has an immediate and potentially shattering effect on military families. Sexual abuse not only can cause severe and enduring harm to children (see *New York v. Ferber*, 458 U.S. 747, 758 & n.9 (1982)), it can also be devastating to the children's parents, who "also are in many ways victims of the crime" (Pet. App. 10a). As the record in this case illustrates, parents of child abuse victims may require psychological counseling (*ibid.*; J.A. 136-139), and their work performance can deteriorate (J.A. 108, 124, 126-127).<sup>4</sup>

<sup>3</sup> See also 131 Cong. Rec. H9290 (daily ed. Oct. 29, 1985) (Rep. Schroeder) (recognizing that "[w]e cannot maintain a peacetime military" without dealing with the concerns and problems of military dependents); *id.* at H5035 (daily ed. June 26, 1985) (Rep. Panetta); *id.* at S6670-S6671 (daily ed. May 21, 1985) (Sen. Nunn); *id.* at S6670 (daily ed. May 21, 1985) (Sen. Kennedy); *Department of Defense Authorization for Appropriations for Fiscal Year 1986: Hearings on S. 674 Before the Senate Comm. on Armed Services*, 99th Cong., 1st Sess. 719 (1985) (statement of General John A. Wickham, Chief of Staff, U.S. Army) ("if we are concerned about readiness in the Army, which is our most important business, we ultimately must deal with families and quality family support"); Coast Guard COMDTINST 1750.3 *Family Advocacy Program* (Apr. 8, 1983), reprinted at J.A. 56 ("The stress military life imposes on families has become recognized as a significant factor in members' performance and in the morale and efficiency of Coast Guard units.").

<sup>4</sup> Before his daughter was molested, Chief Warrant Officer Johnson had rapidly progressed in rank, but after petitioner's offenses were discovered, Johnson was unwilling to take on added responsibilities (J.A. 108). Petty Officer Grantz, a former Marine combat veteran, testified that learning of and dealing with the sexual abuse of his daughter was more trying emotionally than the year he spent on the Demilitarized Zone in Viet Nam (*id.* at 127). After learning about the offenses against his daughter, he was unable to concentrate on his duties and was less willing to trust his fellow servicemembers (*id.* at 124, 126-127).



When the parent is a servicemember, the armed forces are also injured. Here, the efficiency and readiness of the Coast Guard suffered, because the "fathers could not function as effectively in their Coast Guard duty assignments" (Pet. App. 11a).<sup>5</sup> And "it obviously would [be] difficult—if not impossible—for the victims' fathers" to serve with petitioner again (*ibid.*). The armed forces therefore have a strong interest in protecting the well-being of military dependent children not only for their own benefit, but also for the benefit of their servicemember parents and the service itself.

In addition to the direct impact on the performance and readiness of the servicemembers, the Court of Military Appeals properly concluded that crimes of the sort involved in this case "have a continuing effect \* \* \* on the morale of any military unit or organization to which the [victim's] family member is assigned" (Pet. App. 12a). A crime such as sexual abuse of children generates emotions that can easily result in violent retaliation against the offender (see J.A. 139). At the time of the offenses, the victims' fathers worked every day in the same building with petitioner and lived in the same local community. It was fortuitous that petitioner's crimes were not discovered when the parties were in such close quarters. Without the ability "to vindicate the outrage felt from such a grievous breach of faith by one shipmate towards another" (Pet. App. 34a), the parents or other members of the military community might seek their own vengeance on a servicemember accused of such crimes. That result would have a disastrous effect on

<sup>5</sup> See Pet. App. 10a-12a, 32a-33a; Coast Guard *Family Advocacy Program*, *supra*, reprinted at J.A. 57 (child abuse detracts from the efficiency of Coast Guard units and impairs the reputation of the service); see also Hasty, *Military Child Advocacy Programs: Confronting Child Maltreatment in the Military Community*, 112 Mil. L. Rev. 67, 74-76 (1986).

military discipline.<sup>6</sup> To avoid that outcome, the military justice system must be able to respond to the reasonable expectations of the military community that its members will be punished for such crimes. See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508-509 (1984) ("Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to see justice done. \* \* \* When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions"); *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (opinion of Stewart, Powell, & Stevens, JJ.).

It is incorrect to say that the effects of petitioner's crimes would have been the same if they had been committed by a civilian. The military is "a specialized society separate from civilian society" (*Parker v. Levy*, 417 U.S. 733, 743 (1974)), and it may demand that servicemen respect the integrity of the military community (see *Goldman v. Weinberger*, No. 84-1097 (Mar. 25, 1986), slip op. 4 ("to accomplish its mission the military must foster instinctive obedience, discipline, unity, commitment, and esprit de corps")); *Brown v. Glines*,

<sup>6</sup> The military courts have often noted the threat to discipline arising out of sexual assaults by one member of a unit on another member or his dependent. See *United States v. Ruggiero*, 1 M.J. 1089, 1097-1098 (C.M.R. 1977), petition denied, 3 M.J. 117 (C.M.A. 1977) (sexual assault on female member of same unit); *United States v. White*, 1 M.J. 1048, 1051-1052 (C.M.R. 1976), petition denied, 3 M.J. 109 (C.M.A. 1977) (sexual assault on wife of member of same unit). Cf. *United States v. Herring*, 20 M.J. 1002 (C.M.R. 1985) (confrontation off base between two military members will logically continue when they return to duty, threatening maintenance of discipline); *United States v. Shorte*, 18 M.J. 518, 520 (C.M.R. 1984) ("[a]n assault with a dangerous weapon by one servicemember on another, regardless of where it occurs has a clear and measurable impact on the morale, reputation and integrity" of the installation), *aff'd*, 20 M.J. 414 (C.M.A. 1985).



444 U.S. 348, 356-357 n.14 (1980) ("Loyalty, morale, and discipline are essential attributes of all military service"). This need is particularly important for a service like the Coast Guard, which has crews who must be at sea, often for extended periods. Its officers and enlisted personnel must feel secure about the safety of their families in order to perform their duties while away from home. Petitioner's crimes violated the trust that the military seeks to foster among servicemembers. Because of the adverse effect on morale within the unit, the impact on the military of such an offense, when committed by another serviceman, is clearly more damaging than if the offense is committed by a civilian.

In addressing the effect of petitioner's crimes on the military, the courts below focused on the effect that petitioner's conduct had on his command, not merely on the local base or military installation. As the court of military review explained, a command "is more than a physical place or property; it is an organization of people" (Pet. App. 35a). A military commander is responsible for maintaining order within his command, and that obligation "relates to people, without regard to the physical attributes and location of the command" (Pet. App. 35a; see Coast Guard Reg. COMDTINST M500.2, art. 5-1-2 (1980)).

Viewing the impact of criminal conduct on the military command, rather than simply on the military premises, is not inconsistent with *Relford*. The criteria discussed in *Relford* were expressed in terms of their effect on a base, since the crimes there occurred on a military post. Many military units, however, operate away from a base, either temporarily or permanently. The commander of a ship making a visit away from his home port or of an army unit on maneuvers has the same need to maintain discipline within the unit as the commanding officer of a large military installation, where the servicemembers regularly work and live on the post premises.

To restrict court-martial jurisdiction to offenses committed on a military base would render the court-martial sanction almost wholly unavailable to military commands, such as the Coast Guard command in Juneau, that are not based on a discrete military reservation where the servicemembers live and work. If the Alaska crimes had been committed on a military post, they would have been subject to court-martial jurisdiction by virtue of that fact alone. *Relford*, 401 U.S. at 369. In holding that on-base crimes are routinely subject to court-martial jurisdiction, this Court in *Relford* focused on the military's special concern for the security of military personnel and property. Crimes by servicemembers against other servicemembers or their dependents invoke precisely the same concern, even if the servicemembers are members of a command that does not happen to be located on a large tract of military property. There is therefore no reason why the Constitution demands a different result merely because the members of one command live on military property and the members of another live in the local community. Cf. *United States v. Shearer*, No. 84-194 (June 27, 1985), slip op. 5-6 (for purposes of applying the *Feres* doctrine, the off-base situs of particular conduct "is not nearly as important as whether the suit requires the civilian court to second-guess military decisions \* \* \* and whether the suit might impair essential military discipline").

Indeed, in some respects, a military command that lacks a major support installation may be especially susceptible to injury from an offense committed outside its geographic bounds. Few bases are completely self-sufficient today (see *United States v. Lockwood*, 15 M.J. 1, 9 (C.M.A. 1983)), but small units are often totally dependent on the local civilian community for food, housing, schools, financial institutions, and recreation. This was certainly true of the Coast Guard command in Juneau. The good reputation of the service in that community insured that the Coast Guard command received

local cooperation and that the Coast Guard personnel and their families enjoyed a variety of other benefits there. Petitioner's crimes threatened that reputation and the benefits his fellow servicemen and women derived from it.

In response to these considerations, petitioner argues (Br. 17, 29) that the effect of the Alaska crimes on discipline and the military's reputation was insubstantial, since the crimes never came to public attention and since the fathers were transferred before any confrontation occurred. That argument reduces the determination of service connection to fortuitous events. Under petitioner's formulation, jurisdiction would hinge on the emotional vulnerability of the victim,<sup>7</sup> her ability to conceal an assault until she finally escaped her tormentor, or a servicemember's ability to terrorize his victim. Other, identical crimes would be service connected if they were discovered while the parties were still at the same unit and became matters of public knowledge. The military courts properly gave no weight to the fortuities petitioner suggests.<sup>8</sup>

2. In addition to the status of the victims and the potential effect of the offenses on petitioner's command, the military courts relied on other factors in upholding court-martial jurisdiction in this case. As the courts noted, petitioner's Alaska crimes did not stand alone. Petitioner was also charged with similar offenses against

<sup>7</sup> As amicus ACLU points out (Br. 29), predicated jurisdiction on an individual's emotional character would "inevitably lead[] to arbitrary results."

<sup>8</sup> The fact that in a particular case the impact of a crime on the military is reduced should not bar court-martial jurisdiction, as long as offenses of that nature typically, or as a class, have such an impact. By analogy, under the Commerce Clause, it is well settled that Congress may regulate a class of intrastate activities that has an effect on interstate commerce even if an individual instance of such an activity has none. See *Russell v. United States*, No. 84-435 (June 3, 1985), slip op. 4-5; *Perez v. United States*, 402 U.S. 146, 153-154 (1970).

other military dependents on the Coast Guard base at Governors Island, New York (J.A. 6-8), and those on-base crimes were clearly subject to court-martial jurisdiction. *Relford*, 401 U.S. at 369. In these circumstances, the military has a legitimate interest in resolving all the charges against a defendant in a single trial, for a variety of reasons: (1) to allow the defendant to return to his assigned duties if he is exonerated; (2) to enhance the possibility of rehabilitation if he is convicted; (3) to avert the disruptive effect of successive prosecutions in different locations on the victims and their families;<sup>9</sup> (4) to permit the commander to protect the military community against the enhanced dangers posed by recidivist criminal conduct; and (5) to minimize the risk of conflict between the sentencing goals of the military and civilian criminal justice systems.<sup>10</sup> See Pet. App. 14a-16a, 36a-37a; see generally *United States v. Lockwood*, 15 M.J. at 8 (the presence of related crimes that are clearly subject to court-martial jurisdiction may be considered in determining whether other offenses may be tried by court-martial). Indeed, in many situations permitting court-martial jurisdiction over off-base charges that are joined with on-base charges will benefit the defendant as well, by permitting all charges to be resolved in a single proceeding, without exposing the defendant to the uncertainty and burden of a second trial.

<sup>9</sup> The victims in this case obviously would have to testify in a civilian trial in Alaska, but they might well have been required also to testify in the court-martial proceeding in New York, even if that proceeding had been limited to the New York offenses, since petitioner's pattern of conduct with other child abuse victims could have been deemed relevant in that proceeding.

<sup>10</sup> Although the services cannot prevent a state prosecution from going forward after a court-martial, a state is likely to be willing to forgo its own prosecution once the military has court-martialed a servicemember. That is most likely to be the case when the crime involves other servicemembers or military dependents, as was the case here.



3. Both *Relford* (401 U.S. at 368) and *Schlesinger v. Councilman* (420 U.S. at 760) note that among the factors justifying the invocation of court-martial jurisdiction is the inability of civilian courts in particular cases to vindicate distinct military interests. In this case, as the military courts noted (Pet. App. 14a, 16a, 34a-35a), the State of Alaska had a reduced interest and ability to prosecute petitioner for the crimes that he committed in Juneau.

After a routine military reassignment, petitioner and his victims left Alaska for distant locations. There is no reason to believe that petitioner or his victims will voluntarily return to Alaska, and the State cannot force the victims to do so, even if it decides to prosecute petitioner. The Court of Military Appeals thus reasonably concluded that a state prosecution was unlikely (Pet. App. 16a). Moreover, when neither the defendant nor his victims are members of the civilian community, the community's interest in seeing the guilty brought to book is greatly reduced. See *United States v. Trottier*, 9 M.J. 337, 352 (C.M.A. 1980) (since servicemembers are transients, civilian authorities often have a negligible interest and decline to prosecute cases involving them). Here, the State deferred prosecution of petitioner to the Coast Guard, for a variety of reasons (Br. in Opp. App. 1a-3a). Among them was the belief that petitioner's offenses implicated "a distinct military interest that would not be fully considered in any state prosecution" (*id.* at 3a). Accordingly, this factor also argues strongly in favor of court-martial jurisdiction in this case.

4. In weighing the impact of particular offenses on the military, this Court has noted that it must give great deference to the judgment of the military courts on that subject. The Court of Military Appeals and the courts of military review sit atop Congress's "carefully designed military justice system," which provides "both the experience and expertise \* \* \* to evaluate [a crime's] relevance to military discipline, morale, and fitness."

*Schlesinger v. Councilman*, 420 U.S. at 761 n.34. Congress created the Court of Military Appeals precisely "so that disinterested civilian judges could gain over time a fully developed understanding of the distinctive problems and legal traditions of the Armed Forces." *Noyd v. Bond*, 395 U.S. 683, 694 (1969). That court's judgment therefore reflects precisely the type of expertise that this Court has said is not only "singularly relevant," but also "indispensable," to the inquiry required by *O'Callahan* (*Councilman*, 420 U.S. at 760), and is "normally entitled to great deference" (*Middendorf v. Henry*, 425 U.S. 25, 43 (1976)).

Deference to the military courts is particularly appropriate in light of the difficult task that the *O'Callahan* inquiry has assigned to those courts. In the 17 years since *O'Callahan* was decided, the military courts have gradually developed a body of caselaw defining particular offenses as service connected and others as falling outside court-martial jurisdiction.

Petitioner (Br. 15-16) and amici curiae (Army Br. 10; Navy Br. 5-6) are sharply critical of the military court decisions that have extended court-martial jurisdiction to certain off-base offenses. Although petitioner does not expressly seek to limit court-martial jurisdiction to on-base offenses, that would essentially be the effect of the narrow construction of *O'Callahan* and *Relford* that he proposes. While drawing a line between on-base and off-base crimes would provide a bright line test for court-martial jurisdiction, it would impose a tremendous cost on the armed forces. Off-base drug offenses provide a particularly graphic example of that cost.<sup>11</sup> Petitioner and amici criticize the military courts' decisions holding off-base drug offenses to be service connected, but it is

<sup>11</sup> Drug offenses constitute by far the largest class of off-base offenses prosecuted in the military system. The Army, Air Force, and Coast Guard report that drug cases constituted approximately 85% of the "off-base" cases on appeal in military courts as of June 30, 1986.



well recognized that the military has a compelling interest in preventing drug abuse by servicemembers, regardless of where such misconduct occurs. See generally *Williams v. Secretary of the Navy*, 787 F.2d 552, 553-555 & n.1 (Fed. Cir. 1986) (discussing congressional findings and inquiries). It requires little effort to appreciate the debilitating effects of drug offenses on military discipline and readiness, whether the offenses occur on or off post. See *Schlesinger v. Councilman*, 420 U.S. at 760-761 n.34; *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C. Cir. 1975); *United States v. Trotter*, 9 M.J. at 345 ("As military equipment has become more sophisticated, there is the concomitant increased risk that an operator [involved with drugs] will be unable to handle the complicated weapons system with which he is entrusted and upon which his safety and that of others may depend"); S. Rep. 98-53, 98th Cong., 1st Sess. 11 (1983) ("Abuse of controlled substances is one of the most significant disciplinary problems facing the armed forces"); H.R. Rep. 92-433, 92d Cong., 1st Sess. 28 (1971) ("drug abuse is a profoundly serious national problem that is having a grave effect on the Armed Forces").

In 1978, a congressional committee identified as a "major problem" in dealing with drug abuse in the military the requirement of "establishing service connection in the prosecution of military personnel by court martial for offpost drug offenses." House Select Comm. on Narcotics Abuse and Control, 95th Cong., 2d Sess., *A Report on Drug Abuse in the Armed Forces of the United States* 19-20 (Comm. Print 1978). The Court of Military Appeals subsequently held that because of the impact of drug offenses on military discipline and effectiveness, virtually all drug offenses are service connected. See *United States v. Trotter*, 9 M.J. at 351; see also *United States v. Harper*, 22 M.J. 157, 164 (C.M.A. 1986); *Murray v. Haldeman*, 16 M.J. 74, 78-80 (C.M.A. 1983). Since that time, the military has made great strides in ridding itself

of what had formerly been a serious drug problem, in part because the Court of Military Appeals has authorized court-martial prosecutions for off-base drug offenses. See, e.g., *International Narcotic Control Study Missions: Report of the Select Comm. on Narcotics Abuse and Control*, H.R. Rep. 98-951, 2d Sess. 197, 202-216 (1984); R. Bray, et al., *Highlights of the 1985 Worldwide Survey of Alcohol and Nonmedical Drug Use Among Military Personnel* 11-14, 17-22 (1986). In light of these developments, it is clear that a strict on-base/off-base jurisdictional line would have a disastrous effect on the military's continuing efforts to prevent drug use by servicemembers.

Because the Court of Military Appeals is keenly aware of the needs of the military in areas such as drug abuse control and the effect of crimes on military families, that court's judgments on the difficult issue of service connection should be accorded deference. Even on de novo review, we believe that the record below would support the finding of service connection. Applying a more deferential standard of review, the judgment of the Court of Military Appeals clearly should be sustained.

#### **B. Trying Petitioner In the Military System Does Not Violate Due Process**

Relying on *Bowie v. City of Columbia*, 378 U.S. 347 (1964), and *Marks v. United States*, 430 U.S. 188 (1977), petitioner claims (Br. 42-46) that, even if his crimes are held to be service connected, that holding cannot be applied to him without violating due process, since it amounts to an unforeseeable retroactive expansion of the scope of court-martial jurisdiction as it stood at the time he committed those offenses. He contends that the Due Process Clause imposes the same restrictions on the courts that the *Ex Post Facto* Clause imposes on Congress. Accordingly, he maintains that, because Congress could not by statute have retroactively expanded court-martial jurisdiction to reach the Alaska

charges, the military courts may not achieve the same result through case-by-case adjudication.

1. Petitioner did not raise this due process claim at the pre-trial hearing, in the court of military review, or in the Court of Military Appeals. He therefore should not be allowed to raise the claim in this Court for the first time. *Berkemer v. McCarty*, 468 U.S. 420, 433 (1984); *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977). Petitioner has offered no reason for failing to assert this claim in any of the courts below. The decision of the court of military review, which reinstated the charges dismissed by the trial judge, clearly told petitioner that the military courts viewed the Alaska charges as service connected. Petitioner therefore could have raised this claim in the Court of Military Appeals, because by that time, even if not before, he was aware of the construction of court-martial jurisdiction that the military courts were prepared to adopt. Accordingly, there is no need to resolve petitioner's claim in the current posture of this case.

2. In any event, petitioner's claim is wrong on the merits.<sup>12</sup> The Court's decisions in *Bowie* and *Marks* forbid the retroactive application of an unforeseeable judicial expansion of the substantive scope of a criminal

<sup>12</sup> Strictly speaking, the *Ex Post Facto* Clause is not applicable here. The *Ex Post Facto* Clause in terms applies to the legislature, not to the courts. *Frank v. Mangum*, 237 U.S. 309, 344 (1915). Neither *Bowie* nor *Marks* modified that longstanding rule, and *Marks* recognized that the Clause "does not of its own force apply to the Judicial Branch of government" (430 U.S. at 191 (citing *Frank v. Mangum*, *supra*)). Moreover, courts and legislatures are not similarly situated. Courts can only "constru[e] existing law in actual litigation," rather than "impose by legislation a penalty against specific persons or classes of persons." *James v. United States*, 366 U.S. 213, 247 n.3 (1961) (opinion of Harlan, J.). As Justice Harlan explained, it is "obvious" that the policy of restraining arbitrary and potentially vindictive legislation that underlies the *Ex Post Facto* Clause "is inapplicable to decisions of the courts" (*ibid.*). For that reason, neither *Wozberg v. United States*,

statute to reach conduct that a person could not reasonably have believed was criminal at the time he engaged in it.<sup>13</sup> As the Court summarized in *Splawn v. California*, 431 U.S. 595, 601 (1977), "*Bowie* \* \* \* holds that the elements of a statutory offense may not be so changed by judicial interpretation as to deny to accused defendants fair warning of the crime prohibited."

No "fair warning" concern is present here, since petitioner had ample warning that his conduct was a crime. That conduct has been a crime under provisions of the UCMJ that have remained unchanged since 1950 (Arts. 80, 120, 128, 134, UCMJ, 10 U.S.C. 880, 920, 928, 934), and nothing in the decisions below expanded or modified the definition of those offenses. Petitioner's conduct also violated Alaska law (Alaska Stat. §§ 11.41.410 to 11.41.470 (1983)), which renders untenable any claim that he could have believed that his conduct was innocent. See *United States v. Bass*, 404 U.S. 336, 348 n.15 (1971); *Knutson v. Brewer*, 619 F.2d 747, 750-751 (8th Cir. 1980). In addition, *O'Callahan* did not rule that the question whether a particular offense is service connected is an ingredient of the crime itself or must be set forth by statute or established by case law with the same de-

329 F.2d 284 (9th Cir.), cert. denied, 379 U.S. 823 (1964), nor *United States v. Juvenile*, 599 F. Supp. 1126 (D. Or. 1984), aids petitioner, because both cases involved statutory amendments.

<sup>13</sup> *Bowie* held that due process barred the conviction of two black college students for their refusal to leave an "all-white" lunch counter where the "narrow and precise" (378 U.S. at 352) state criminal trespass statute under which they were convicted on its face prohibited only the entry onto the property of another in violation of previously-given notice (*id.* at 349 n.1), and where, prior to the conduct at issue, that statute had never been construed to cover the refusal to leave the property of another (*id.* at 350). *Marks* held that the new standard for determining the constitutionality of obscene materials that was adopted in *Miller v. California*, 413 U.S. 15 (1973), could not be retroactively applied to conduct that occurred prior to the decision in *Miller*. 430 U.S. at 196-197.



gree of precision that is necessary for the elements of a crime. On the contrary, the Court's later decisions in *Relford* and *Councilman* expressly endorsed an *ad hoc* approach to the question whether a particular crime is service connected. 401 U.S. at 369; 420 U.S. at 760.<sup>14</sup>

Petitioner contends (Pet. 44-45), however, that the fair warning concerns underlying *Bowie* and *Marks* are also applicable to the service-connection determination required by *O'Callahan*, on the ground that a serviceman is entitled to know whether he will be subject to a court-martial at the time that he commits a crime. But the "fair warning" concern underlying *Bowie* and *Marks* has no parallel in this context. The conduct charged against petitioner was clearly a crime, and he cannot legitimately rely on procedural barriers to his prosecution for those offenses at the time he committed them. See *United States v. Ross*, 456 U.S. 798, 824 n.33 (1982). Thus, because "no legitimate reliance interest can be frustrated" (*id.* at 824) by a case-by-case method of determining service connection, the rule stated in *Bowie* cannot be combined with the rule created by *O'Callahan* in the manner that petitioner suggests.

In any event, the military courts' rulings were not unforeseeable. In claiming that the decision below was unforeseeable, petitioner relies on three opinions of the Court of Military Appeals rendered before this Court's 1971 decision in *Relford v. Commandant*, *supra*. In those cases, the Court of Military Appeals had ruled that the crime of sexual child abuse was not subject to a court-

<sup>14</sup> Court-martial jurisdiction is defined by statute, and the UCMJ vests the military justice system with jurisdiction over all service-members for any offense defined in the UCMJ. Art. 2, UCMJ, 10 U.S.C. 802. Establishing that a crime is service connected does not vest a court-martial with jurisdiction over that offense; rather, that showing simply makes it "appropriate" for a military tribunal to exercise its already-existing jurisdiction. *Gosa v. Mayden*, 413 U.S. 665, 674, 677 (1983) (plurality opinion). Contrary to petitioner's suggestion (Br. 44), the judgment below therefore did not extend court-martial "jurisdiction" to petitioner in the first instance.

martial when that offense occurred outside a military base, since *O'Callahan* required "some connection 'between [the defendant's] military duties and the crimes in question'" to establish service connection (*United States v. McGonigal*, 19 C.M.A. 94, 95, 41 C.M.R. 94, 95 (1969)). See also *United States v. Shockley*, 18 C.M.A. 610, 611, 40 C.M.R. 322, 323 (1969); *United States v. Henderson*, 18 C.M.A. 601, 602, 40 C.M.R. 313, 314 (1969).

This Court's decision in *Relford* undermined the rationale applied by the Court of Military Appeals in its prior opinions on this issue. *Relford* held that the status of a victim as the dependent of a serviceman is an important consideration in determining whether an offense is appropriately subject to court-martial jurisdiction. 401 U.S. at 366. *Relford* also rejected the argument that a crime must be connected with a serviceman's "military duties" before it can be tried by a court-martial. *Id.* at 363-364, 366, 369. The Court of Military Appeals indicated in *Trottier*, 9 M.J. at 342-345, and *Lockwood*, 15 M.J. at 5-6, 10, that its pre-*Relford* decisions would have to be reconsidered in light of this Court's decision in that case. The Court of Military Appeals also specifically pointed out that its prior decisions regarding off-base crimes would be reexamined.<sup>15</sup> Those decisions by the highest military court put petitioner on notice that the military might seek to court-martial him for crimes such as these. Because petitioner could have reasonably foreseen the rulings in this case, there is no merit to his claim that he lacked adequate notice of the prospect that he might be tried before a court-martial. See *United*

<sup>15</sup> Although the Court of Military Appeals' decision in *Trottier* involved a narcotics offense, the opinion does not suggest, as petitioner (Br. 43-44) and the ACLU (Br. 57-59) claim, that that court's revised approach to court-martial jurisdiction would be limited to such crimes. See *United States v. Lockwood*, *supra* (off-base fraud offenses are service connected).



*States v. Rodgers*, 466 U.S. 475, 484 (1984); *Lockett v. Ohio*, 438 U.S. 586, 597 (1978); *Welton v. Nix*, 719 F.2d 969, 970 (8th Cir. 1983).<sup>16</sup>

## II. THIS COURT'S DECISION IN *O'CALLAHAN* v. *PARKER* WARRANTS RECONSIDERATION

If petitioner's acts of sexual assault on military dependents are not service connected under *O'Callahan*, then there is something seriously wrong with that decision. The practical effect of ruling that petitioner's crimes are not service connected will be to divest military courts of jurisdiction presently exercised over numerous other offenses committed outside a military base. That loss of authority will have a serious detrimental impact on the military's ability to maintain order, discipline, and readiness. Accordingly, if the Court disagrees with our submission in Point I, we urge the Court to reexamine the service-connection requirement adopted in *O'Callahan* and to return to Congress the authority it historically possessed to define court-martial jurisdiction.

### A. The Doctrine Of *Stare Decisis* Does Not Preclude Reconsideration Of *O'Callahan* v. *Parker*

The doctrine of *stare decisis* serves important purposes in our legal system. It promotes the evenhanded, predictable, and consistent development of legal principles; it fosters reliance on judicial rules; and it contributes to the fact and appearance of integrity in our judicial system. See, e.g., *Vasquez v. Hillery*, No. 84-836 (Jan. 14, 1986), slip op. 11; *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 272 (1980) (plurality opinion). Nonetheless, as Justice Frankfurter explained, "*stare decisis* is

<sup>16</sup> Petitioner does not suggest that he relied on the Court of Military Appeals' pre-*Relford* decisions when he planned or carried out the Alaska crimes. In any event, because those acts violated both the UCMJ and Alaska law, any such reliance would not be entitled to any weight. *United States v. Ross*, 456 U.S. at 824 n.33; cf. *United States v. Bass*, 404 U.S. at 348 n.15.

a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). For that reason, "[i]t is \* \* \* not only [the Court's] prerogative but also [its] duty to reexamine a precedent where its reasoning or understanding of the Constitution is fairly called into question." *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 627-628 (1974) (Powell, J., concurring). See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58 n.30 (1977); *Garcia v. San Antonio Metropolitan Transit Auth.*, No. 82-1913 (Feb. 19, 1985), slip op. 8-28; *Erie R.R. v. Tomkins*, 304 U.S. 64 (1938).

Although this Court has never adopted a "rigid formula" for determining when to overrule a prior decision (*Vasquez*, slip op. 11), it has identified several factors that bear on this inquiry. It is well settled that *stare decisis* has less force when constitutional issues, rather than matters of statutory construction, are involved, because "correction through legislative action is practically impossible." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932) (Brandeis, J., dissenting).<sup>17</sup> In addition, *stare decisis* has less weight when the prior ruling was itself a departure from past precedents,<sup>18</sup> when new circumstances or subsequent decisions have eroded the rationale or the precedential value of the prior decision,<sup>19</sup>

<sup>17</sup> See also, e.g., *Thomas v. Washington Gas Light Co.*, 448 U.S. at 272-273 (plurality opinion); *Monell v. Department of Social Services*, 436 U.S. 658, 695 (1978); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974).

<sup>18</sup> E.g., *Thomas*, 448 U.S. at 273 (plurality opinion); *Monell*, 436 U.S. at 696; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. at 47; *United States v. Darby*, 312 U.S. 100, 116-117 (1941).

<sup>19</sup> E.g., *United States v. Leon*, 468 U.S. 897, 908-913 (1984); *Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 357-361 (1984); *United States v. Salvucci*, 448 U.S. 83, 88 (1980); *Hughes v. Okla-*

and when experience demonstrates that the earlier rule has proved unworkable, has bred confusion, or has led to unforeseen or anomalous results.<sup>20</sup> In sum, *stare decisis* "bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function" (285 U.S. at 407-408 (footnote omitted)). When the decision in *O'Callahan* is carefully analyzed, the foregoing considerations dictate reconsideration and rejection of the service-connection requirement imposed by that case.<sup>21</sup>

#### B. *O'Callahan* Was A Radical Departure From The Court's Prior Decisions

*O'Callahan* was "a clear break with the past." *Gosa v. Mayden*, 413 U.S. 665, 672 (1973) (plurality opinion) (citation omitted). In an unbroken line of decisions extending back to 1858, this Court had recognized that (1) Congress had the authority to define court-martial offenses, (2) neither the Fifth Amendment right to indictment by a grand jury nor the Sixth Amendment right to trial by a petit jury applied to

*homa*, 441 U.S. 322, 331-332 (1979); *Brown v. Board of Education*, 347 U.S. 483, 492-495 (1954); *Tigner v. Texas*, 310 U.S. 141, 145-147 (1940).

<sup>20</sup> *E.g.*, *Garcia v. San Antonio Metropolitan Transit Auth.*, slip op. 18; *Continental T.V., Inc.*, 433 U.S. at 47; see also *Texas v. McCullough*, No. 84-1198 (Feb. 26, 1986), slip op. 6-8; *Wainwright v. Witt*, No. 83-1427 (Jan. 21, 1985), slip op. 8-13.

<sup>21</sup> The Court is less reluctant to reconsider a prior decision when doing so will not disturb legitimate reliance. *E.g.*, *Arkansas Electric Coop. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 392 (1983); *Ross*, 456 U.S. at 824 n.33; *Monell*, 436 U.S. at 699-700. As we have noted above, no such interests are implicated by *O'Callahan*. Page 26, *supra*.

court-martial proceedings, and (3) "military status in itself was sufficient for the exercise of court-martial jurisdiction" (*id.* at 673 (plurality opinion)).<sup>22</sup> As the Court had observed less than a decade before *O'Callahan*, "[t]he test for jurisdiction \* \* \* is one of *status*, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval Forces.' \* \* \* Without contradiction, the materials furnished show that military jurisdiction has always been based on the status of the accused, rather than on the nature of the offense." *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243 (1960) (emphasis in original).<sup>23</sup> In these circumstances, where a prior decision not only "announce[d] a new constitutional principle," but also "effected a decisional change in attitude that had prevailed for many decades" (*Gosa*, 413 U.S. at 673 (plurality opinion)), considerations of *stare decisis* "cut in both directions"

<sup>22</sup> See *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 78-79, 82 (1858); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866); *id.* at 137-138 (opinion of Chase, C.J.); *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878); *Ex parte Reed*, 100 U.S. 13, 21 (1879); *Ex parte Mason*, 105 U.S. 696, 700-701 (1881); *Smith v. Whitney*, 116 U.S. 167, 182-186 (1886); *Johnson v. Sayre*, 158 U.S. 109, 114 (1895); *Grafton v. United States*, 206 U.S. 333, 348 (1907); *Kahn v. Anderson*, 255 U.S. 1, 8-9 (1921); *Ex parte Quirin*, 317 U.S. 1, 40-44 (1942); *Whelchel v. McDonald*, 340 U.S. 122, 126-127 (1950); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 14 & n.5 (1955); *Reid v. Covert*, 354 U.S. 1, 19-20, 22, 37 n.68 (1957) (plurality opinion); *id.* at 41-43 (Frankfurter, J., concurring in the result); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 243, 246 (1960).

<sup>23</sup> See also, *e.g.*, *Reid*, 354 U.S. at 19 (plurality opinion) (the "natural meaning [of Art. I, § 8, Cl. 14] \* \* \* refers to persons who are members of the armed services"); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 123 ("Everyone connected with these branches of the [military] service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts.").



(*Monell v. Department of Social Services*, 436 U.S. 658, 708 (1978) (Powell, J., concurring)).<sup>24</sup>

### C. Developments In The Military Justice System Over The Past Two Decades Have Undercut The Rationale Of *O'Callahan*

The principal reason given in *O'Callahan* for limiting court-martial jurisdiction was that the military justice system did not adequately protect the rights of servicemembers charged with crimes. 395 U.S. at 263-266. Because military tribunals did not provide servicemembers with procedural safeguards comparable to those found in civilian courts, *O'Callahan* explained, court-martial jurisdiction should be limited to "the least possible power adequate to the end proposed" of maintaining an adequate fighting force (*id.* at 265 (citation omitted)). That rationale lacks force today, because *O'Callahan's* description of the military justice system is no longer accurate. Current military procedure bears faint resemblance to that of 30 years ago under which Sergeant *O'Callahan* was tried. The military criminal justice sys-

<sup>24</sup> *O'Callahan's* abrupt departure from the foregoing line of precedents might have been justified if the Court had revisited historical materials not fully analyzed by its prior decisions. See *Monell*, 436 U.S. at 664-689. But the *O'Callahan* Court did not do so. Amicus Army Defense (Army Br. 11-14) argues that the Framers intended to limit court-martial jurisdiction to purely military offenses, since court-martial jurisdiction had been so limited under the Articles of War during the American Revolution. We submit that this argument is flawed for the reasons given by Justice Harlan in his dissent in *O'Callahan*. 395 U.S. at 277-282; see also Comment, 15 Vill. L. Rev. 712, 719 n.38 (1970). At worst, the relevant English and American history is a draw. Nelson & Westbrook, *Court-Martial Jurisdiction Over Servicemen For "Civilian" Offenses: An Analysis of O'Callahan v. Parker*, 54 Minn. L. Rev. 1, 8-19 (1969). Accordingly, in determining whether *O'Callahan* was correctly decided, the Court should not "disregard the implications of an exercise of judicial authority assumed to be proper for [100] years" (*Monell*, 436 U.S. at 696 (citation omitted)).

tem has undergone profound changes as the result of three major congressional amendments to the UCMJ,<sup>25</sup> two major revisions of the *Manual for Courts-Martial*,<sup>26</sup> the promulgation of regulations by each branch of the armed forces governing criminal procedure, and the experience gained by military courts in criminal law and procedure. These developments show that the criticisms voiced in *O'Callahan* no longer have merit.<sup>27</sup>

1. *O'Callahan* was particularly concerned with the process by which a court-martial was convened. At the time of Sergeant *O'Callahan's* trial, the authority who convened a court-martial<sup>28</sup> appointed the presiding officer, the members of the court-martial panel, and counsel for the prosecution and defense. *Manual for Courts-Martial* para. 4g(1) (1951). Since a convening officer "usually ha[d] direct command authority" over court-martial participants, the Court in *O'Callahan* was concerned by "the possibility of influence on the actions of the court-martial by the officer who convenes it" (395 U.S. at 264). In recognition of that concern, important safeguards have been established to eliminate the possibility of improper influence by the convening officer over the trial judge, defense counsel, and court-martial members.

<sup>25</sup> See Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335; Military Justice Amendments of 1981, Pub. L. No. 97-81, 95 Stat. 1085; Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393.

<sup>26</sup> See *Manual for Courts-Martial* (1969); *Manual for Courts-Martial* (1984). The Manual is now reviewed and updated yearly. Exec. Order No. 12,473, 3 C.F.R. 201 (1984).

<sup>27</sup> These important changes contradict petitioner's assertion (Br. 9) that "[n]o developments since then, in the military or society" justify overruling *O'Callahan*. Even Amici Army and Navy Defense Appellate agree that the quality of military justice has improved since *O'Callahan* (Army Br. 20; Navy Br. 14).

<sup>28</sup> Arts. 22-24, UCMJ, 10 U.S.C. 822-824, list the persons who may convene a court-martial.



a. The Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335, replaced the presiding or law officer with a military judge, an attorney specially selected by the Judge Advocate General on the basis of his experience and expertise in military criminal law.<sup>29</sup> In cases tried by a general court-martial,<sup>30</sup> the judge is a subordinate of the Judge Advocate General, not of the convening authority. The 1968 Act also prohibited the convening authority or a member of his staff from preparing or even reviewing any report about a judge's fitness in the performance of his judicial duties.<sup>31</sup> Art. 26(c), UCMJ, 10 U.S.C. 826(c). The Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1393, eliminated all vestiges of command control over military judges by divesting the convening authority of authority to designate the trial judge in a particular case. Art. 26(a), UCMJ, 97 Stat. 1393, 1394. And in 1984, the President required that judges must be detailed to a court-martial by other persons who are assigned to judicial duties. *Manual for Courts-Martial*, Rule for Courts-Martial 503(b) (1984) [hereinafter cited as *Manual*, RCM]. In sum, military trial judges are no longer subject to command influence

<sup>29</sup> See, e.g., Art. 26(b), UCMJ, 10 U.S.C. 826(b); *Coast Guard Military Justice Manual* COMDTINST M5810.1A, § 303-2 (Apr. 10, 1985); *Army JAGC Personnel Policies* para. 8-1, Selection of Military Judges (1985-1986).

<sup>30</sup> Compare Art. 18, UCMJ, 10 U.S.C. 818 (jurisdiction of general courts-martial), with Art. 19, UCMJ, 10 U.S.C. 819 (jurisdiction of special courts-martial), and Art. 20, UCMJ, 10 U.S.C. 820 (jurisdiction of summary courts-martial). See generally *Middendorf v. Henry*, 425 U.S. 25, 31-33 (1976).

<sup>31</sup> Although *O'Callahan* mentioned this amendment in a footnote (395 U.S. at 264 n.3), that revision was not effective at the time of the Court's decision. *O'Callahan's* criticisms of the military justice system therefore could not have taken into account the operation of the new system and were premised on the fact that the presiding officer was a subordinate of the convening authority (*id.* at 264), which was true at the time Sergeant *O'Callahan* was tried, but is not true today.

and now possess virtually the same degree of judicial independence as their civilian counterparts.<sup>32</sup>

b. It is also no longer possible for a convening authority to influence the manner in which defense counsel are selected or perform their duties. The Military Justice Act of 1968 forbade convening authorities and commanding officers from criticizing defense counsel for zealously representing their clients. Art. 37(b), UCMJ, 10 U.S.C. 837(b); see also *Manual*, RCM 104(b)(1)(B). To "remove any hint or possibility of impartial command influence in the selection of such court-martial personnel" (S. Rep. 98-53, 98th Cong., 1st Sess. 13 (1983)), the Military Justice Act of 1983 required the Secretary of each service to prescribe by regulation how defense counsel will be appointed, rather than leaving that decision to the convening authority. Art. 27(a)(1), UCMJ, 97 Stat. 1394. The Secretaries of the Army and the Air Force have created separate corps of defense counsel under the supervision of the Judge Advocate General of each service, thereby removing such personnel from the command of convening authorities.<sup>33</sup> The Navy has also created a system that separates defense counsel from the

<sup>32</sup> To be sure, military trial judges do not enjoy the life tenure and salary protections possessed by Article III judges. That fact, which was noted in *O'Callahan* (395 U.S. at 264), is still unchanged. At the same time, a servicemember tried before a military judge is "no more disadvantaged and no more entitled to an Art. III judge than any other citizen of any of the 50 States who is tried for a strictly local crime." *Palmore v. United States*, 411 U.S. 389, 410 (1973). As *Palmore* makes clear, "trial by a nontenured judge [does not] deprive [a federal defendant] of due process of law under the Fifth Amendment any more than the trial of the citizens of the various States for local crimes by judges without protection as to tenure deprives them of due process of law under the Fourteenth Amendment." *Ibid.*

<sup>33</sup> See Army Reg. 27-10, ch. 6 (Dec. 10, 1985); Air Force Reg. 111-1, paras. 3-6, 13-3 (Aug. 1, 1984).

convening authority's chain of command.<sup>34</sup> And the Coast Guard has also taken steps to ensure that defense counsel are independent.<sup>35</sup>

c. Congress and the President have also sought to insulate court-martial members from command influence. A 1968 amendment to Article 37 of the UCMJ, which already forbade the censure or reprimand of court-martial members for the manner in which they perform their duties, added a prohibition against adverse comments in fitness reports. Art. 37(b), UCMJ, 10 U.S.C. 837(b). The President emphasized these prohibitions when he issued the 1984 *Manual* by expressly enjoining all forms of influence over court-martial members. *Manual*, RCM 104(a) and (b). As an additional protection, the military courts have been vigilant to ensure that commanders do not influence court-martial members. See, e.g., *United States v. Miller*, 19 M.J. 159, 163-165 (C.M.A. 1985); *United States v. Grady*, 15 M.J. 275, 276 (C.M.A. 1983); *United States v. Rosser*, 6 M.J. 267, 271 (C.M.A. 1979).<sup>36</sup>

2. O'Callahan faulted the military criminal justice system because it used rules of evidence, procedure, and discovery that were markedly different from the ones applied in civilian courts. 395 U.S. at 264. That description is no longer accurate.

<sup>34</sup> See *Navy Legal Services Office Manual*, NAVLEGSVCINST 5800.1, Sections 0100-0104, 0401(a)-(c) (Apr. 18, 1980). Moreover, in the Marine Corps fitness reports on defense counsel are prepared by an independent Regional Defense Counsel. Marine Corps Order 5800.11A (Nov. 15, 1985).

<sup>35</sup> The Coast Guard is not large enough to warrant establishing a separate corps of defense counsel, but the Coast Guard permits a defendant to request an attorney who is not assigned to duty within the geographic region of the commander who convened the court-martial. *Coast Guard Military Justice Manual* COMDTINST M5810.1A, § 302-2 (Apr. 10, 1985).

<sup>36</sup> These cases are not, as some contend (Army Br. 18-19), an argument for restricting court-martial jurisdiction, but are a vivid demonstration that the system can ferret out and correct errors.

In 1980, the President amended the *Manual* by issuing the Military Rules of Evidence. Executive Order No. 12,198, 3 C.F.R. 151 (1980). The Military Rules are identical to the Federal Rules of Evidence, except where necessary to meet unique military concerns. S. Saltzburg *et al.*, *Military Rules of Evidence Manual* 1, 5 (1981); Analysis of the 1980 Amendments, *Manual* A22-51; e.g., *United States v. Powell*, 22 M.J. 141, 143-145 (C.M.A. 1986); *United States v. Gonzalez*, 16 M.J. 58, 60 (C.M.A. 1983). One of the principal reasons for the 1984 revision of the *Manual* was to "conform [court-martial procedure] to Federal practice to the extent possible" (Analysis of the 1980 Amendments, *Manual* A21-1).<sup>37</sup> The remaining differences are required by military needs and cannot be described as "substantial" (O'Callahan, 395 U.S. at 264).<sup>38</sup>

Defense discovery was initially broadened in the 1969 revision of the *Manual* "to make it clear that the defense is entitled to the equal opportunity to prepare his case."<sup>39</sup> RCM 701(a), the discovery rule in the current *Manual*, "is intended to promote full discovery to the maximum extent possible," and it "provides for broader discovery than is required in Federal practice." Analysis, *Manual*

<sup>37</sup> Art. 36, UCMJ, 10 U.S.C. 836, authorizes the President to prescribe procedures for courts-martial. It provides that these rules shall "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts," unless the UCMJ or the President provides otherwise.

<sup>38</sup> For example, Mil. R. Evid. 404(a)(2) (*Manual* at III-19) allows the prosecution to introduce character evidence of a victim's peaceful behavior in assault cases, because of the military's need to deter unlawful assaults by servicemembers living in close quarters. Compare Fed. R. Evid. 404(a)(2) (similar rule limited to homicide cases in which self-defense is claimed). S. Saltzburg *et al.*, *supra*, at 185.

<sup>39</sup> Air Force Summary of Changes to the *Manual for Courts-Martial*, 1969, ch. XXIII, at 44 (1969).



A21-29; see also *United States v. Toledo*, 15 M.J. 255, 256 (C.M.A. 1983); Moyer, *Procedural Rights of the Military Accused: Advantages Over A Civilian Defendant*, 22 Me. L. Rev. 105, 114-117 (1970).<sup>40</sup> Additionally, in cases tried by a general court-martial, there is a pretrial investigation that is similar to a full preliminary hearing in the civilian system. Art. 32, UCMJ, 10 U.S.C. 832; *Manual*, RCM 405(f) and (g). That hearing affords the accused the opportunity to preview the government's case and to cross-examine its witnesses, thereby providing an important discovery vehicle not generally available in civilian criminal proceedings. *Manual*, RCM 405(a) Discussion, at II-37; *Gosa*, 413 U.S. at 681 n.6 (plurality opinion); *United States v. Ledbetter*, 2 M.J. 37, 43 (C.M.A. 1976); Moyer, *supra*, 22 Me. L. Rev. at 114-117.

A variety of other changes in the military justice system have contributed to making military prosecutions much more like their civilian counterparts than they were at the time of Sergeant O'Callahan's trial. For example, the Military Justice Act of 1968 gave a defendant

<sup>40</sup> For example, RCM 701 not only requires the government to disclose to the defense all items covered by Fed. R. Crim. P. 16(a), but it also requires that, upon service of the charges, the defense must be furnished with copies of all sworn or signed statements relating to the charges, the names and addresses of all witnesses the prosecution intends to call, and an opportunity to interview the government's witnesses. By contrast, in a federal criminal prosecution, statements of a witness need not be furnished to the defense until after the witness has testified at trial (18 U.S.C. 3500(a)), and there is no statutory requirement that the government provide the defense with a list of or the opportunity to interview its witnesses.

O'Callahan also criticized military discovery procedure on the ground that the process for obtaining evidence and witnesses was "to a significant extent, dependent upon the approval of the prosecution" (395 U.S. at 264 n.4). Under the current system, however, the military judge is solely responsible for controlling the discovery process. *Manual*, RCM 701(g); see Moyer, *supra*, 22 Me. L. Rev. at 123-125.

the right to request a trial by a military judge alone and provided for a form of release pending review that is similar to bail pending appeal, through deferral of punishment. Arts. 16 and 57(d), UCMJ, 10 U.S.C. 816 and 857(d). The Military Justice Act of 1983 provided for defense counsel to assist a defendant throughout the post-trial direct review process. Art. 38(c), UCMJ, 97 Stat. 1395. The 1984 *Manual* established procedures for determining whether a defendant may be confined before trial, including a hearing at which the member is entitled to counsel (*Manual*, RCM 305), and it created speedy trial requirements similar to those applicable in the federal courts (RCM 707). The military justice system is therefore no longer subject to the criticism voiced in the O'Callahan opinion for following procedures that impaired the fairness of the fact-finding process and undermined the independence of the court, the court-martial members, and counsel for the defendant.

3. O'Callahan broadly declared that "courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." 395 U.S. at 265. To buttress that assertion, O'Callahan pointed to Article 134 of the UCMJ, 10 U.S.C. 934, which prohibits, inter alia, "all disorders and neglects to the prejudice of good order and discipline in the armed forces." O'Callahan hinted that Article 134 was unconstitutionally vague. In *Parker v. Levy*, however, the Court ruled that Article 134 and its counterpart Art. 133, UCMJ, 10 U.S.C. 933, which prohibits conduct unbecoming an officer and a gentleman, are not unconstitutionally vague. 417 U.S. at 757.

This Court's perception of the military justice system has also changed. Six years after O'Callahan, this Court was willing to assume that "the military court system will vindicate servicemen's constitutional rights." *Schlesinger v. Councilman*, 420 U.S. at 758; see also *Middendorf v. Henry*, 425 U.S. at 43. In the years since O'Callahan, military trial and appellate courts have gained



considerable experience in resolving constitutional issues.<sup>41</sup> And the Military Justice Act of 1983 gave this Court jurisdiction, for the first time, to review the decisions of the Court of Military Appeals, which will enable this Court more directly to supervise the administration of justice by the military courts. Art. 67(h), UCMJ, 10 U.S.C. (Supp. II) 867(h); 28 U.S.C. (Supp. II) 1259.

**D. O'Callahan Is Inconsistent With Subsequent Decisions Deferring To Congressional And Professional Military Judgments On Matters Of Military Discipline And Readiness**

Underlying the ruling in *O'Callahan* was the view that the Constitution required the courts in each case to balance de novo Congress's authority to govern the armed forces against a servicemember's rights to indictment and a jury trial. The Court rejected Justice Harlan's view that the Court was improperly allocating to itself the task of making a determination that "the Constitution has placed in the hands of the Congress" (395 U.S. at 275 (dissenting opinion)). Since *O'Callahan*, however, the Court has repeatedly endorsed Justice Harlan's position that Congress has the primary responsibility for striking the proper balance between the military's needs and servicemembers' rights, and that professional military judgments on matters of discipline and effectiveness are entitled to particular deference. See *Goldman*, slip op. 4-5; *Chappell v. Wallace*, 462 U.S. 296, 300-305 (1983); *Rostker v. Goldberg*, 453 U.S. 57, 64-66, 70-71 (1981);

<sup>41</sup> See, e.g., *United States v. Sauer*, 15 M.J. 113 (C.M.A. 1983) (Self-Incrimination Privilege); *Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982) (Due Process Clause); *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (search and seizure); *United States v. Rivas*, 3 M.J. 282 (C.M.A. 1977) (effective assistance of counsel); see also S. Rep. 98-53, *supra*, at 33 (noting that "the very success of the Court [of Military Appeals] has called into question the basis for excluding review by the Supreme Court").

*Brown v. Glines*, 444 U.S. at 357, 360; *Middendorf v. Henry*, 425 U.S. at 43; *Greer v. Spock*, 424 U.S. 828, 837-838 (1976); *Schlesinger v. Councilman*, 420 U.S. at 753; *Parker v. Levy*, 417 U.S. at 756; *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); cf. *Shearer*, slip op. 6. That deference is rooted in the express constitutional commitment of the governance of the nation's armed forces to Congress and the President (Art. I, § 8; Art. II, § 2, Cl. 1), and in the unsuitability of most military decisions to civilian court review. See, e.g., *Goldman*, slip op. 4.

Congress is in the best position to decide what crimes and servicemembers should be subject to court-martial jurisdiction as a general matter. The rationale of the service-connection doctrine is that a crime must affect military interests before a court-martial may exercise its jurisdiction over that offense. Insofar as that determination rests on policy and factual matters, Congress is clearly the institution best suited to make that judgment.

The President and his military subordinates are in the best position to decide in an individual case whether a servicemember should be court-martialed for a particular crime. A commanding officer bears the ultimate responsibility for maintaining discipline within his unit (see, e.g., Coast Guard Reg. COMDTINST M5000.3, art. 4 1-12 (1980)), and he is best situated to gauge the effect of a particular violation of military law on discipline, readiness, and morale. In making these determinations, a commanding officer must rely on his training and experience, which have no parallel in the civilian community, and his judgment often cannot be expressed in terms of the criteria listed in *Relford*. As the Court has often stated, the "'complex, subtle, and professional decisions as to the \* \* \* training \* \* \* and control of a military force are essentially professional military judgments'" (*Chappell*, 462 U.S. at 302 (citation omitted)). By contrast, the civilian courts are "'ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have'" (*id.* at

305, quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962)). See *Goldman*, slip op. 4.

#### E. The Service-Connection Requirement Adopted In *O'Callahan* Has Proved Confusing And Burdensome In Practice

1. As Justice Harlan predicted in his dissent in *O'Callahan*, the service-connection requirement has "creat[ed] confusion and proliferate[d] litigation over \* \* \* jurisdictional issue[s]" (395 U.S. at 284). Although *Relford* settled the question of jurisdiction over on-base offenses, it has exacerbated the confusion over off-base crimes. Perhaps the clearest example of this confusion is in the area of off-base drug offenses.

Shortly after *O'Callahan* was decided, the Court of Military Appeals held that drug offenses were of such "singular military significance" that their trial by court-martial was not affected by that case. *United States v. Beeker*, 18 C.M.A. 563, 565, 40 C.M.R. 275, 277 (1969). Seven years later, however, using a mechanical application of the factors enumerated in *O'Callahan* and *Relford*, the same court concluded that off-base drug offenses by a servicemember had an insufficient effect on the military to support court-martial jurisdiction. *United States v. Williams*, 2 M.J. 81, 82 (C.M.A. 1976); *United States v. McCarthy*, 2 M.J. 26, 29 (C.M.A. 1976). In fact, in *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979), the court held that the off-base use of marijuana by a superior officer in the presence of his subordinates, all of whom were military policemen, was not service connected. In 1980, however, the Court of Military Appeals once more reversed its position. Again considering factors set out in *O'Callahan* and *Relford*, the Court of Military Appeals held that "the gravity and immediacy of the threat to military personnel and installations posed by the drug traffic and by drug abuse convince us that very few drug involvements of a service person will not be

'service connected.'" *Trottier*, 9 M.J. at 351 (footnote omitted). See also *United States v. Harper*, 22 M.J. at 164; *Murray v. Haldeman*, 16 M.J. at 78-80. In this case, too, the Court of Military Appeals acknowledged that it had revised its position as to whether the off-post sexual assault of military dependents was service connected (Pet. App. 9a). These examples refute petitioner's claim (Br. 8) that the service-connection doctrine has become a "well-defined principle of law."<sup>42</sup>

2. *O'Callahan* has also required a substantial expenditure of time and resources in litigating jurisdictional issues. In this case, for example, litigation of the jurisdictional issue consumed two days in the trial court and nine months on appeal before petitioner's guilt or innocence of the charges could be considered.<sup>43</sup> In the military, the diversion of resources from the determination of a defendant's guilt or innocence is not the only cost. Evidentiary hearings are common, and they frequently require testimony from commanders, superior officers, and military law enforcement officials about the

<sup>42</sup> Petitioner argues (Br. 37-39) that the discussion accompanying Section 203 of the *Manual* suggests that the service-connection doctrine is well settled and highly predictable. In fact, the discussion and analysis accompanying the rule suggests nothing of the kind. For example, the analysis section (Pet. App. 49a) contains a warning that "[s]ince the constitutional limits of subject matter jurisdiction are matters of judicial interpretation, specific rules are of limited value and may unnecessarily restrict jurisdiction more than is constitutionally required" (emphasis added).

Experience shows that the service-connection issue has been an extraordinarily fertile source of appellate litigation. The Court of Military Appeals and the courts of military review have issued almost 400 published decisions dealing with the service-connection question, and many more unpublished ones.

<sup>43</sup> This expenditure of time is by no means atypical. The Air Force reports that out of nearly 1,000 cases prosecuted between August 1, 1984, and June 30, 1986, approximately 12% involved litigation of the issue of service connection.



impact of the charged offense on military interests. This cost is also significant because, as this Court has recognized, the time of key military personnel "may be better spent than in possibly protracted disputes over the imposition of discipline." *Middendorf*, 425 U.S. at 46 (footnote omitted).

#### F. Congress Should Be Free To Define The Proper Scope Of Court-Martial Jurisdiction

Petitioner (Br. 39) and Amicus Army Defense Appellate Division (Army Br. 14) argue that *O'Callahan* struck the proper balance between the interests of the armed forces and servicemembers and that this balance should not be disturbed. As we have explained, however, prior to *O'Callahan* this Court had long recognized that Article I and the Fifth Amendment struck the proper balance and that it did not need to be fine-tuned in every case. Because the improvements in the military justice system have largely eroded the rationale of *O'Callahan*, the only remaining question is whether the benefits of indictment by a grand jury and trial by a petit jury should trump Congress's authority to define court-martial jurisdiction. We submit that they should not.

1. *Indictment*. Most crimes committed off-post would be tried in state court, and a state defendant has no constitutional right to indictment by a grand jury. *Hurtado v. California*, 110 U.S. 516 (1884). In addition, most military offenses are tried by special courts-martial, which cannot impose a sentence of confinement in excess of six months. Art. 19, UCMJ, 10 U.S.C. 819.<sup>44</sup> Even in the federal system, a defendant has no right to an indictment for such crimes. Fed. R. Crim. P. 7(a); *Duke v. United States*, 301 U.S. 492 (1937). In cases tried by a

<sup>44</sup> During Fiscal Year 1984, for example, there were 10,087 special courts-martial, and only 2,592 general courts-martial. *Annual Report of the Code Committee on Military Justice* 27, 38, 49, 55 (Oct. 1, 1983 to Sept. 30, 1984).

general court-martial, where an indictment would be required in federal court, the adversarial Article 32 UCMJ investigation serves the grand jury's function of determining whether there is probable cause that a crime has been committed and protecting citizens against unfounded criminal prosecutions. See *Manual*, RCM 405(f) and (g) (rights of a defendant at an Art. 32 investigation); compare *Branzburg v. Hayes*, 408 U.S. 665, 686-687 (1972). This investigation extends to the servicemember protections not afforded to his civilian counterpart. *Gosa*, 413 U.S. at 681 n.6 (plurality opinion); see also *Mercer v. Dillon*, 19 C.M.A. 264, 266, 41 C.M.R. 264, 266 (1970); Moyer, *supra*, 22 Me. L. Rev. at 109-114; Swanson, *The Article 32 Right of An Accused to Pre-Trial Cross-Examination of the Witnesses Against Him "If They Are Available,"* 24 Air Force L. Rev. 246, 249, 253 (1984).<sup>45</sup>

2. *Petit jury*. As noted above, most military prosecutions cannot result in a term of imprisonment in excess of six months. Defendants in those cases would not be entitled to trial by jury in state or federal court. *Duncan v. Louisiana*, 391 U.S. 145, 158 (1968); *Cheff v. Schnackenberg*, 334 U.S. 373 (1966). In the remaining cases, a military defendant is tried by a court-martial panel "best qualified for the duty by reason of age, education, training, experience, length of service and judicial temperament." Art. 25, UCMJ, 10 U.S.C. 825; see also *Manual*, RCM 502(a) and 503(a).<sup>46</sup> *Duncan v. Louisiana* ad-

<sup>45</sup> Not only is the military accused given an adversarial hearing before an impartial investigating officer (Art. 32, UCMJ, 10 U.S.C. 832; *Manual*, RCM 405; *United States v. Collins*, 6 M.J. 256, 258-259 (C.M.A. 1979)) with the rights described in the *Manual*, but no charges may be sent to a general court-martial until the report of investigation has been reviewed by a judge advocate who must make a legal determination of probable cause (Art. 34, UCMJ, 10 U.S.C. 834; *Manual*, RCM 406 and 601).

<sup>46</sup> The panels can include members of similar rank, since enlisted defendants may at their request have enlisted members on their court. Art. 25(c), UCMJ, 10 U.S.C. 825(c); *Manual*, RCM 503(a) (2.)



mitted that a "criminal process which was fair and equitable but used no juries is easy to imagine" (391 U.S. at 150 n.14), and it noted that the Court's decision to require the states to provide jury trials for serious crimes was not intended to "cast doubt on the integrity of every trial conducted without a jury" (*id.* at 157).<sup>47</sup> The plurality in *Gosa v. Mayden* also recognized that the court-martial system did not lack fundamental fairness, stating that such "proceedings are not basically unfair" (413 U.S. at 680-681) and that "[n]othing \* \* \* in *O'Callahan* indicates that the major purpose of that decision was to remedy a defect in the truth-determining process" (*id.* at 682). In fact, the panel chosen for a court-martial is often "more nearly a jury of his peers than is a civilian panel in a State where the member may be involuntarily stationed." *Mercer v. Dillon*, 19 C.M.A. at 266, 41 C.M.R. at 266. In some cases, servicemembers "may well receive a more objective hearing" from a panel of military members than from a local jury of the civilian community. *Gosa*, 413 U.S. at 681 n.6 (plurality opinion).

History also supports the conclusion that court-martial proceedings are not fundamentally unfair because no jury is used. The Framers were well acquainted with the absence of juries in the military. Relying on British practice, Congress first established the present size of general courts-martial for the Navy in 1782 (22 J. Continental Cong. 325) and for the Army in 1786 (30 *id.* 145). Congress had a rational basis rooted in two centuries of experience for continuing the structure of courts-martial when it enacted the UCMJ in 1950, and Congress has refused to depart from that path ever since.<sup>48</sup> This history is powerful evidence that Congress

<sup>47</sup> This was a principal reason that the right to a jury trial was not applied retroactively. *DeStefano v. Woods*, 392 U.S. 631, 633-634 (1968).

<sup>48</sup> Since the enactment of the UCMJ in 1950, Congress has passed 23 different acts amending various sections of the UCMJ, but it has

has found the court-martial system to be a "fair and equitable" non-jury system of the kind the Court described in *Duncan*.

In sum, since the decision in *O'Callahan* there have been sweeping changes in the military justice system, and during the same period this Court has repeatedly acknowledged the appropriateness of deferring to Congress on matters of military discipline and effectiveness. These developments call for *O'Callahan* to be reconsidered. No longer is there a basis for a judicial limitation on the will of Congress that all violations of the UCMJ by servicemembers should be tried by court-martial. Eliminating that restriction will also end the confusion resulting from the unstructured question of service-connection. For the reasons set forth above, the Court should reject the service-connection requirement created in *O'Callahan* and should return to Congress the authority to define court-martial jurisdiction.

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never seen fit to alter the membership of courts-martial. The most recent of these statutes was the Department of Defense Authorization Act of 1986, Pub. L. No. 99-145, 99 Stat. 678 *et seq.* The citations to the other 22 statutes are collected in our brief in opposition (at 12-13 n.10) in *Garwood v. United States*, cert. denied, No. 85-175 (Dec. 2, 1985). We have provided counsel for petitioner with a copy of that brief.

**CONCLUSION**

The judgment of the Court of Military Appeals should be affirmed.

Respectfully submitted.

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# In the Supreme Court of the United States

OCTOBER TERM, 1986

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RICHARD SOLORIO, PETITIONER,

*v.*

UNITED STATES OF AMERICA, RESPONDENT.

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS

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## PETITIONER'S REPLY BRIEF

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**In the Supreme Court of the United States**

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**PETITIONER'S REPLY BRIEF**

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1. The Government asserts that there is a need to "end the confusion resulting from the unstructured question of service-connection." Government's Brief at 47. This assertion misplaces the cause of the confusion, however. Any confusion is the result of the Court of Military Appeals' flexible service-connection analysis, not this Court's service-connection requirement.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), and *Relford v. Commandant*, 401 U.S. 355 (1971), this Court has given remarkably clear guidance for analyzing service-connection questions. This Court's unanimous *Relford* decision, which the Government and the courts below have virtually ignored, is especially clear and helpful. It explicitly sets out an analytic framework consisting of definite criteria,<sup>1</sup> which, in the more than fifteen years since *Relford* was decided, has produced consistent and predictable results.

On the other hand, the Court of Military Appeals' recent flexible service-connection analysis is so pliable it is meaningless. Consequently, it has generated just the kind of confusion this Court sought to prevent when it spelled out its own service-connection analysis in *Relford*.

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<sup>1</sup> *Relford v. Commandant*, 401 U.S. at 365 & 367-69 (1971). See Brief for the Petitioner 24 n.18 & 25 n.19.



The Government surprisingly suggests that the best way to avoid the confusion resulting from the Court of Military Appeals' erroneous service-connection standard is to do away with the service-connection requirement. Government's Brief 47. But, clearly, requiring adherence to this Court's service-connection analysis is the best way to avoid the confusion which the Court of Military Appeals' flexible analysis engenders. Requiring adherence to the service-connection analysis set out in *O'Callahan*, and *Relford*, will leave intact the settled and well-defined law of service-connection<sup>2</sup> and, moreover, will not result in the abrupt curtailment of servicemembers' right to a civilian trial for civilian offenses.

2. The decision of the Court of Military Appeals should be reversed because it employed an incorrect standard to find that the Alaska offenses were service-connected. Even if the Government were correct in assuming, as it does, that the *Relford* criteria are not exhaustive, Government's Brief 11, that does not mean that lower courts can totally ignore those criteria and decide the service-connection question solely on the basis of a few factors which were not considered important in *O'Callahan* or *Relford*. The *Relford* criteria must be the touchstone for any proper service-connection analysis.

The Court of Military Appeals faithfully followed *O'Callahan* and *Relford* for many years by requiring a thorough, *Relford* service-connection analysis. Only relatively recently,<sup>3</sup> has it begun to depart from its precedents in favor of a more flexible, unstructured standard.

The Government has failed to respond to petitioner's showing that the service-connection standard used by the Court of Military Appeals was improper. Despite its conclusion that the confusion resulting from the unstructured service-connection analysis must end, the Government simply assumes that the Court of Military Appeals' meaningless service-connection test is correct and bases its factual argu-

<sup>2</sup> Petitioner has shown that service-connection had become a settled and well-defined principle of law. Brief for the Petitioner 36-39.

<sup>3</sup> The Court of Military Appeals began its departure from what it now terms a "slavish" application of the *Relford* criteria in 1980. See Brief for the Petitioner 14 n.8.

ment on that improper standard. Just as the military appellate courts below have done, the Government argues that the facts of this case support court-martial jurisdiction without bothering to perform a *Relford* analysis. Rather than apply the *Relford* criteria to balance petitioner's interest in a civilian trial against the military's interest in a court-martial, the Government relies almost entirely upon unproven, theoretical impacts which it infers from the dependent status of the victims and the nature of the Alaska offenses.

On the other hand, petitioner, like the trial judge,<sup>4</sup> has set out a thorough and detailed *Relford* analysis which shows that the issue of service-connection is not even a close question here; none of the *Relford* criteria support court-martial jurisdiction.<sup>5</sup>

<sup>4</sup> The Government objects to petitioner's reference to the trial judge's findings of fact without noting that the Court of Military Review held some findings of fact to be erroneous. Government's Brief 4 n.1. This appeal, however, is from the decision of the Court of Military Appeals, and that court specifically criticized that aspect of the Coast Guard Court's decision, stating:

A military judge's fact finding power under Article 62 cannot be superseded by a Court of Military Review in an appeal under Article 62, see *United States v. Burris*, 21 M.J. 140 (C.M.A. 1985). To some extent the Court of Military Review may have erred in this direction; but any such error is immaterial, because, on the basis of undisputed facts, we conclude that the offenses in Alaska were service-connected.

*United States v. Solorio*, 21 M.J. 251, 254 (C.M.A. 1986), cert. granted, \_\_\_ U.S. \_\_\_, 106 S.Ct. 2914 (1986), Pet. App. 8a.

<sup>5</sup> The Government argues that even if the petitioner's offenses had a "reduced" impact on the military, because of the "fortuities" of this case, court-martial jurisdiction should be upheld. Government's Brief 18. Ignoring the fact that *O'Callahan* and *Relford* require service-connection to be determined on the facts of each case, *Relford* 401 U.S. 365-66 & 369, the Government suggests that petitioner's offenses, *per se*, justify finding service-connection "as long as offenses of that nature typically, or as a class," have a significant impact on the military. Government's Brief 18 n.18. Of course, even if this Court were to overrule its precedents and accept this proposition, the Government has failed to prove that petitioner's offenses are of a nature, or belong to a class, such that they typically have a significant effect upon the military.

3. Having failed to address the correct service-connection standard, the Government goes on to create strawmen based on positions petitioner has not taken. The Government states that petitioner is critical of decisions extending court-martial jurisdiction to off-base offenses, and that petitioner seeks, in effect, to limit court-martial jurisdiction to on-base offenses. Government's Brief 21; *see also id.* at 17 & 28.

This is absolutely incorrect. Petitioner seeks only to leave intact the settled and well-defined law of service-connection. *See supra* p. 2. Under those settled principles, crimes committed off-base in peacetime can be tried by court-martial if they are petty offenses, offenses committed overseas, uniquely military offenses, offenses having a significant impact upon a military installation, and offenses involving military status. Brief for the Petitioner 38. What petitioner has criticized is the use of an improper service-connection standard to greatly expand court-martial jurisdiction beyond these limits.

a. The Government discusses the military interest in preventing drug abuse at length. Government's Brief at 21-23 & 42-43. This case does not involve drug offenses, however, and a finding that the facts of this case do not support court-martial jurisdiction will not affect jurisdiction over off-base drug offenses. The Court of Military Appeals' rationale for holding most drug offenses to be service-connected is their pervasive impact on military readiness, making the prohibition of drug use, arguably, a proper exercise of authority stemming from the war power. *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980); *But see Note, Service-Connection and Drug Related Offenses: The Military Court's Ever-Expanding Jurisdiction*, 54 Geo.Wash.L.Rev. 118 (1985) (the authors are highly critical of the Court of Military Appeals' recent service-connection analysis, in general, and its application to drug offenses in *Trottier*, in particular). That issue is not now before this Court, however, and need not be addressed.<sup>6</sup> Whatever a fully developed

<sup>6</sup> The case in which the Court of Military Appeals held that most drug offenses are service-connected, *Trottier*, 9 M.J. 337, was decided before servicemembers were permitted to directly appeal to this Court. Addressing

record in a drug case might reveal about the impact of drug abuse on the military, there has been no suggestion that sex offenses against dependents have a similar effect on readiness or are otherwise related to authority stemming from the war power.

b. The Government also argues at length about the armed services' interest in military families, the military community and military commands. Government's Brief 12-18. This is not a case, however, where the Coast Guard's interest in a military community or a military command is really an issue. After ample opportunity, the Government was unable to prove that any such interests have suffered in a significant way from petitioner's Alaska offenses. The time to have proven such an impact was at trial, not by rationalization on appeal.

One of the most significant reasons for finding that the offenses here are not service-connected is the fact that there is no Coast Guard enclave at Juneau and, consequently, there is no Coast Guard community separate and distinct from the civilian community.<sup>7</sup> Brief for the Petitioner 4, 23, 28-30.

that issue, in the abstract, in this case would represent an advisory opinion. If the issue is as pressing as the Government, by its heavy emphasis on the point, seems to believe, a case will certainly present itself in which the matter can be properly decided with the benefit of a fully developed record.

<sup>7</sup> In *O'Callahan*, this Court established that the commission of an offense off-base was a relevant factor tending to show that service-connection was lacking. In *Relford*, this factor was given even greater significance by the holding that virtually all on-base offenses are service-connected. In *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983), the Court of Military Appeals muddled this Court's straightforward distinction between on-base and off-base offenses, and turned that distinction on its head, holding that the proximity of an off-base offense to a military installation is relevant, and is a factor tending to support service-connection. This holding was made despite the court's recognition of "the fact that *O'Callahan* itself involved an off-post crime committed in a city located near several military installations." *Id.* at 9. The court stated that this new factor is "quite relevant to service connection" because,

[a]n offense committed by a servicemember near a military installation tends to injure relationships between the military community and



There could be no impact from petitioner's offenses on a military base or on a military community at Juneau, because no military base and no military community distinct from the civilian community exists there. *Id.*

The Alaska offenses had *no impact* on the Coast Guard command at Juneau. Indeed, they were not even reported until after petitioner, the victims and their families had all left the command. *Id.* at 5, 29-30. There is not even any evidence that anyone in Juneau, outside of law enforcement circles, has ever become aware of these offenses. *Id.* at 5, 32. Moreover, any impact on the Coast Guard's interest in military families, the military community and the military command at Governors Island, where petitioner was tried, obviously resulted from the offenses he committed there, rather than from the Alaska offenses. *Id.* at 30-31.

Finally, the military families to which the victims of petitioner's offenses belonged lived in the civilian community, *id.* at 4, and depended on civil authorities, rather than the Coast

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the civilian community and thereby makes it more difficult for servicemembers to receive needed local support. In a sense, Lockwood's actions tended to injure the base population at Sheppard Air Force Base.

*Id.* Lockwood is one of the major service-connection cases decided after the Court of Military Appeals began to take an expansive view of court-martial jurisdiction. The case was not subject to direct review by this Court, because it was decided before servicemembers were permitted to appeal directly. Although the correctness of this holding is highly questionable, if the Court of Military Appeals' holding is accepted for arguments sake, it logically follows that the absence of any military enclave in proximity to the off-base offense is a factor weighing heavily against service-connection. Moreover, even if proximity to a military base is not relevant *per se*, the lack of proximity obviously can result in a factual absence of any significant impact from the offense on the military. This point is independently supported by the Court of Military Appeals' observation that

*Relford* recognized the importance of "geographical" relationships and it noted that, according to a passage from W. Winthrop, *Military Law and Precedents* (2d ed. 1920 reprint), on which both the majority and dissenters relied in *O'Callahan*, a crime was punishable by court-martial even when committed against a civilian "near" a military post. 401 U.S. at 368, 91 S.Ct. at 657.

*Id.*

Guard, for police protection. Their associations with petitioner merely as a neighbor were much more significant than any associations resulting from his being a member of the Coast Guard. *Id.* at 4-5, 27. Therefore, finding that the facts of this case do not support court-martial jurisdiction will not deprive the services of jurisdiction over off-base offenses where there is, in fact, a significant impact on their interest in military families, the military community and military commands.

4. Factually, the Government has failed to prove any significant impact on the Coast Guard's interest in military families, the military community and military commands. It also argues, therefore, that these interests, *in the abstract*, justify holding that the dependent status of a victim is, *per se*, sufficient to make an offense service-connected, Government's Brief 12, or justify reconsidering *O'Callahan* and *Relford*, *id.* at 28. There is no basis for this argument.

Obviously, courts-martial cannot settle all of the problems of military families, or even punish all of the crimes committed against them. Courts-martial can only address criminal offenses committed by servicemembers. Without diminishing the importance of military families and the military community, this Court can recognize that courts-martial are not ideally suited for use as a family advocacy tool.<sup>8</sup> Such use of the military justice system ranges far afield of its real purpose, which is to maintain discipline in the armed forces. Digressions from that purpose weaken rather than strengthen the military justice system.

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<sup>8</sup> The Government has cited the Military Family Act of 1985, Pub. L. No. 99-145, 99 Stat. 678 *et seq.*, as evidence of Congress' recognition that military families' positive view of service life is important to recruitment, morale and retention of servicemembers. Government's Brief 12. There is nothing in the Act, however, to indicate that Congress felt that limits on court-martial jurisdiction cause military families to have a more negative view of service life. In fact, it is perfectly reasonable to expect that expansion of court-martial jurisdiction, with the attendant loss of constitutional protections, to include civilian offenses that are not service-connected, would actually be a disincentive to recruitment, morale and retention, causing servicemembers, and their families, to have a more negative view of service life.



Although the Government argues as if there were no reasonable alternative to courts-martial,<sup>9</sup> the military justice system is clearly meant to be a limited adjunct to the federal and state criminal justice systems for crimes committed within this country.<sup>10</sup> The law of service-connection, developed under *O'Callahan* and *Relford*, gives appropriate weight to the armed services' interest in protecting military families, the military community and military commands. But, correctly, it does not hold that the military interest in every case is sufficient to outweigh the servicemember accused's interest in a civilian trial.

<sup>9</sup> The Government argues that the military must be able to punish servicemembers for offenses committed against dependents, as if the only alternative is for parents or other members of the military community to seek their own vengeance. Government Brief 14-15. Regardless of the fact that alternatives do exist, this argument cannot have been intended seriously; court-martial jurisdiction does not expand, and constitutional rights do not contract, as necessary to ward off vigilantism by military personnel.

<sup>10</sup> In *United States v. Mariea*, 795 F.2d 1094 (1st Cir. 1986), the court noted "[i]t is clear that for service personnel—especially those stationed in this country in times of peace—military justice was designed to supplement, not displace, the civilian criminal justice system." *Id.* at 1101. The Government asserts that this Court's principal reason for limiting court-martial jurisdiction is that the military justice system did not adequately protect servicemembers charged with crimes. Government's Brief 32. It then goes on to compare the military justice system to the federal and state criminal justice systems, as if the military were a sovereign state and the military justice system were designed for the same purposes as the federal and state criminal justice systems. *Id.* at 32-40, 44-46. Petitioner certainly does not agree that the military justice system gives servicemembers the same constitutional protections as the federal and state criminal justice systems. *See infra* p. 12-15. But, the Government's argument has a more fundamental flaw. Court-martial jurisdiction is limited, because the military justice system is basically different from the federal and state criminal justice systems; its overriding purpose is to maintain discipline in the armed forces. *O'Callahan*, 395 U.S. at 261-65. Moreover, court-martial jurisdiction is limited because of an historical "disapproval of the general use of military courts for trial of ordinary crimes." *Id.* at 268 [footnote omitted]. The *O'Callahan* decision notes an abiding suspicion of courts-martial, resulting from abuses of their power, from England, before the American Revolution, throughout our national history. *Id.* at 268-72.

Offenses committed by servicemembers against military families on a military base, where military police under the direction of a base commander provide protection, are presumed to be service-connected. However, when such offenses are committed off-base, where civilian police under the direction of civil authorities provide protection, a significant impact on the military—a service-connection—must be proven to justify court-martial jurisdiction.

Upholding these principles and reaffirming their correctness in this case, would not, as the Government suggests, limit court-martial jurisdiction to on-base offenses. Government's Brief 17. The service-connection requirement has never completely barred court-martial jurisdiction over off-base offenses. *See supra* p. 4 & note 7.

There is no basis for the Government's implicit suggestion that the commander of an army unit on maneuvers or a ship away from home port would be unable to maintain discipline in the unit. Government's Brief 16. The on-duty status of the servicemember has always been an important factor supporting court-martial jurisdiction. Obviously, offenses committed by servicemembers while deployed in the field, or underway on a ship, will almost certainly be service-connected.

Finally, abstractions such as those advanced by the Government had less to do with the decision to try petitioner at court-martial than trial tactics. What the Government is seeking is greater flexibility to try accuseds in the forum that most disadvantages the defendant, whether it is a court-martial or a civilian court. In this case, the Government preferred trial by court-martial because it wanted to join the Alaska offenses with the New York offenses.

Many of the offenses involved ambiguous situations. The evidence as to the New York offenses was weaker than the evidence as to the Alaska offenses because the victims were younger and their credibility was questionable. Evidence of a criminal intent as to the Alaska offenses, while still insufficient, was somewhat stronger. Trying all of the offenses at once made a much more convincing case, and this could only be done in a court-martial with its worldwide jurisdiction and

liberal joinder of offenses rules. The Government could have proceeded with prosecution of the New York offenses at any time during the months that it appealed the dismissal of the Alaska offenses, but the Government chose to wait for the outcome of its appeal so that it could try all the offenses together.

While the Government is arguing here that it needs greater jurisdiction over off-base offenses, in a series of recent cases it has argued that *on-base* drunk driving charges should be tried in the district courts, over the objection of the accused. *E.g.*, *United States v. Mariea*, 795 F.2d 1094 (1st Cir. 1986); *United States v. Walker*, 552 F.2d 566 (4th Cir), *cert. denied*, 434 U.S. 848 (1977); *United States v. Fulkerson*, 631 F.Supp. 319 (D. Hawaii 1986); *United States v. O'Byrne*, 423 F.Supp. 588 (E.D. Va. 1973). In *Mariea*, trial in district court tended to disadvantage the accuseds because they could be convicted either on the basis of being under the influence of alcohol or having a certain blood alcohol content. *See* 795 F.2d at 1096 n.2. In a court-martial the Government would have had to prove that the accuseds were drunk. *See id.* at 1097 n.6. Moreover, the court noted in *Mariea* that the civilian system subjected the accused to "possibly harsher, laws and punishments." *Id.* at 1100; *see id.* n.16.

Certainly, any abstract military interest in military families, military communities and military commands is not sufficient to support court-martial jurisdiction in this case. Moreover, reconsideration of *O'Callahan* and *Relford* is not called for because this Court's service-connection test adequately protects those interests.

5. The Government suggests that *O'Callahan* should be reconsidered because it was a radical departure from this Court's prior decisions, Government's Brief 30, and because Congress is better suited than this Court to make judgments about the permissible limits of court-martial jurisdiction, *id.* at 41. The *O'Callahan* decision cannot correctly be described as a radical departure from this Court's prior decisions. As this Court noted in *O'Callahan*:

We have held in a series of decisions that court-martial jurisdiction cannot be extended to reach any person not a

member of the Armed Forces at the time of both the offense and the trial. Thus, discharged soldiers cannot be court-martialed for offenses committed while in service. *Toth v. Quarles*, 350 U.S. 11. Similarly, neither civilian employees of the Armed Forces overseas, *McElroy v. Guagliardo*, 361 U.S. 281; *Grisham v. Hagan*, 361 U.S. 278; nor civilian dependents of military personnel accompanying them overseas, *Kinsella v. Singleton*, 361 U.S. 234; *Reid v. Covert*, 354 U.S. 1, may be tried by court-martial.

395 U.S. at 267. The service-connection requirement is simply an extension of these decisions limiting court-martial jurisdiction.

Moreover, if this Court accepts the Government's argument that Congress and military commanders are better suited than this Court to make judgments about the permissible limits of court-martial jurisdiction, there is no logical reason to stop at reconsidering the service-connection requirement. If this Court must defer to Congress and the President, because limitations on court-martial jurisdiction are solely within the scope of their authority over national defense and military affairs, then this Court's decisions limiting court-martial jurisdiction over discharged soldiers, civilian employees and dependents were also wrongly decided.

Obviously, there are constitutional limits on Congress' authority to extend court-martial jurisdiction. In *O'Callahan*, this Court found that prosecution of offenses that are not service-connected is beyond the scope of Congress' authority over national defense and military affairs, or is at least a constitutionally inappropriate use of that authority. Therefore, the Government's argument that this Court should abandon the service-connection test and instead defer to the Congress and military commanders is without basis.

6. The Government argues that the military justice system now compares more favorably to civilian criminal justice system than it did before *O'Callahan* was decided. Government's Brief 32-40. Petitioner has already shown that the procedural shortcomings of a trial by court-martial are



not the only reason for limiting court-martial jurisdiction to service-connected offenses. *Supra* note 10. Moreover, the Government's argument dismisses, or fails to recognize the fact, that the most important changes were passed by Congress before *O'Callahan* was decided, and had been implemented by the time *Relford* was decided two years later.

The Government cites "three major congressional amendments to the UCMJ, two major revisions of the *Manual for Courts-Martial*, the promulgation of regulations by each branch of the armed forces governing criminal procedure, and the experience gained by military courts in criminal law and procedure," Government's Brief 33 (footnotes omitted), as having made the military justice system comparable to a civilian criminal justice system, *id.* All of the most significant changes providing protections for the accused, however, are the result of the Military Justice Act of 1968, Pub.L.No. 90-632, 82 Stat. 1335. The *Manual for Courts-Martial* was revised in 1969 to implement that Act, and since then the changes to the military justice system have been relatively minor. Their net effect has benefited the Government more than military accuseds.<sup>11</sup>

Despite the changes described by the Government, fundamental differences between the military justice system and civilian criminal justice systems remain. Some of the defi-

<sup>11</sup> For example: the Military Justice Amendments of 1981, Pub.L.No. 97-81, 95 Stat. 1085, for the first time allow commanders to involuntarily place certain servicemembers in a leave without pay status during their appeals, *id.* at § 2(c)(1), 95 Stat. 1087 (Art. 76a, 10 U.S.C. § 876a (1982)), authorize starting the 60 day time limitation for seeking further appeal by constructive, rather than personal, service of Court of Military Review decisions, *id.* at § 5, 95 Stat. 1088 (Art. 67(c)(2), 10 U.S.C. § 867(c)(2) (1982)), and give the services sweeping power to restrict the right to individual military counsel by allowing them to define "reasonably available", *id.* at § 4(b), 95 Stat. 1088 (Art. 38(b)(7), 10 U.S.C. § 838(b)(7) (1982)); the Military Justice Act of 1983, Pub.L.No. 98-209, 97 Stat. 1393, for the first time authorizes government appeals, *id.* at § 5(c)(1), 97 Stat. 1398 (Art. 62, 10 U.S.C. § 862 (Supp. I 1983)), and allows convening authorities to execute any punishments, except for death or a punitive discharge, without conducting any legal review of the court-martial or taking any action on the findings, *id.* at § 5(a)(1), 97 Stat. 1395 (Art. 60(c), 10 U.S.C. § 860(c) (Supp. I 1983)).

ciencies in the military justice system are inherent; they, most likely, will never change. The Government's claim that the 1984 revisions to the *Manual for Courts-Martial* have conformed court-martial procedure to Federal practice, and that remaining differences "cannot be described as 'substantial,'" Government's Brief 37 (citation omitted), is simply incredible.

Certainly one substantial difference that remains is the extraordinary control over the law enforcement, prosecution and adjudicative functions that is combined in the commanding officer with authority to convene courts-martial. Unlike civilian criminal justice systems, these functions are not kept separate and detached in the military justice system. As a result, these commanding officers, called convening authorities, still have immense power to influence every step of the court-martial process.

A convening authority can initiate and direct investigations within his command. Rule 303, Rules for Courts-Martial [RCM], *Manual for Courts-Martial*, United States, 1984 [MCM 1984]. In furtherance of such an investigation, the convening authority can authorize searches for evidence without complying with procedural requirements like those prescribed by Rule 41(c), Federal Rules of Criminal Procedure [Fed.R.Crim.P.] (requiring that all information supporting a search warrant be obtained under oath and be in writing or be recorded at the time the warrant is issued). Rule 315, Military Rules of Evidence, MCM 1984.

If any charges result from the investigation, the convening authority can refer them to court-martial. Rules 404 and 407, RCM, MCM 1984. In some cases an Article 32, 10 U.S.C. § 832 (1982), pre-trial investigation is required but, regardless of the investigating officer's recommendation, the convening authority can refer the charges to court-martial, as long as he is advised, or reasonably believes, that the evidence warrants the charges. Art. 34, 10 U.S.C. § 834 (Supp. III 1985); Rule 601(d), RCM, MCM 1984.

The convening authority still hand picks the members of the court-martial who sit as finders of fact, Art. 25(d)(2), 10 U.S.C. § 825(d)(2) (1982); Rule 503(a)(1), RCM, MCM 1984,



unless the accused chooses trial by judge alone. Furthermore, only a two-thirds vote is required to convict, except where the death penalty is mandatory, Art. 52(a), 10 U.S.C. § 852(a) (1982). This jury is not required to be any larger than five members, even in the most serious cases. Art. 16, 10 U.S.C. § 816 (1982 & Supp. III 1985); Rule 501(a)(1), RCM, MCM 1984. Moreover, the accused is allowed only one peremptory challenge to this hand-picked panel, Art. 41(b), 10 U.S.C. § 841(b) (1982); Rule 912(g)(1), RCM, MCM 1984, a significant difference from Rule 24, Fed.R.Crim.P. This permits a court member to sit on a court-martial without being subject to peremptory challenge at all, when added to the court to bring it up to a quorum after the accused has used his peremptory challenge. See *United States v. Holley*, 17 M.J. 361 (C.M.A. 1984).

Deferment of sentence, which the Government likens to post-trial bail, Government's Brief 39, is granted or denied by the convening authority at his discretion. Rule 1101(c), RCM, MCM 1984. And, as petitioner has already noted, *supra* note 11, the convening authority can execute any punishments, except for death or a punitive discharge, without conducting a legal review of the court-martial and without even acting on its findings. Art. 60, 10 U.S.C. § 860 (Supp. III 1985); Rule 1107(a)-(d), RCM, MCM 1984.

While the extraordinary power combined in the convening authority, when exercised lawfully, is itself a substantial difference from civilian criminal justice systems, the resulting problem of unlawful command influence is totally out of place in any fair system of criminal justice. Unfortunately, neither Congress nor the military courts have found a way to eliminate this continuing problem in military justice.

The Government suggests, in quite sweeping language, that the attempts of military courts to remedy the damage done by unlawful command influence, where it can be demonstrated, is a vindication of the military justice system rather than a reason to restrict its jurisdiction.<sup>12</sup> Govern-

<sup>12</sup> In a recent case, *United States v. Thomas*, 22 M.J. 388 (C.M.A. 1986), petition for cert. filed, 55 U.S.L.W. 3412 (U.S. November 21, 1986), the Court of Military Appeals recognized that "[m]erely remedying the error in

ment's Brief 36. Obviously, however, command influence, whether lawful or unlawful, is an important reason for restricting court-martial jurisdiction to cases involving significant military interests. This Court's service-connection requirement has done no more than that.

The Government has also suggested that the arrangements under which military judges serve ensure that they have the same judicial independence as civilian judges. Government's Brief 34-35. Citing *Palmore v. United States*, 411 U.S. 389, 410 (1973), the Government argues that a servicemember tried before a military judge is in the same position as a defendant tried in a state court. Government's Brief 35 n.32. This argument, however, fails to recognize that military judges enjoy no term of office at all. Not only are they untenured, they serve as judges only so long as they have military orders assigning them judicial duties. In effect, they serve at the pleasure of the military service of which they are a part.

There is, in fact, a substantial difference between being tried by a state judge who has the protection of a term of office, and a military judge who does not. This difference is a sufficient basis for treating civilian trials as constitutionally preferable to courts-martial.<sup>13</sup>

While certainly not exhaustive, these examples ought to be sufficient to demonstrate that there continue to be substantial differences between trial by a court-martial and trial by a civilian court—differences which cause the military courts to come in a distant second in protecting the rights of

cases before us is not enough." *Id.* at 400. However, all it did beside that is warn that "incidents of illegal command influence simply must not recur in other commands in the future" and that it would "consider much more drastic remedies" in future cases. *Id.*

<sup>13</sup> This case does not call on the Court to determine whether a military judge, who serves without any term of office, may constitutionally try serious felony charges in peacetime within the continental limits of the United States. Whether the circumstances under which military judges serve violate Fifth Amendment due process should be addressed in a case directly raising that issue. Such a case is currently before the Court. *United States v. Rivera*, 23 M.J. 89 (C.M.A. 1986), petition for cert. filed, 55 U.S.L.W. 3495 (U.S. January 2, 1987).

criminal accuseds. Together with the fundamental difference in purpose between these systems and the historic suspicion of courts-martial, these are ample grounds for the limitation of court-martial jurisdiction to service-connected offenses.

7. The Government argues that application of the Court of Military Appeals' decision, retroactively expanding court-martial jurisdiction – in a complete departure from its closest precedents on point – to petitioner, does not violate due process in the manner of an *ex post facto* law. Government's Brief 23-28. The Government, however, deals with only one aspect of the due process problem; it takes the position that petitioner cannot claim any due process violation because he had fair notice that his conduct was criminal under Alaska law. *Id.* at 25. This argument ignores the fact that the retroactive expansion of court-martial jurisdiction has disadvantaged petitioner by depriving him, without notice, of a complete jurisdictional defense, barring trial by court-martial, and of constitutional protections he would have had in a civilian trial.

Moreover, the addition of a military criminal sanction to that allowed under Alaska law retroactively increases the penalty that existed when the offenses were committed. Alaska and the United States being separate sovereigns, each can prosecute if court-martial jurisdiction is expanded to include these offenses, Rule 201(d)(2), RCM, MCM 1984; see e.g. *United States v. Wheeler*, 435 U.S. 313 (1978), and the sentences would be *cumulative*. Article 14(b), UCMJ, 10 U.S.C. § 814(b) (1982). Therefore, the penalties petitioner faces have been increased retroactively as a result of the Court of Military Appeals' decision.<sup>14</sup>

Both disadvantage to the accused's substantial rights, and enhancement of the punishment, are well accepted as effects that justify finding an *ex post facto* violation. *Weaver v.*

<sup>14</sup> The fact that Alaska has chosen, so far, not to prosecute, or that the military sentence is less than what could have been adjudged under Alaska law, is immaterial since *ex post facto* analysis looks to what might have been adjudged rather than the actual sentence. See *Weaver v. Graham*, 450 U.S. 24, 30, 32 n.17 & 33 (1981); *Lindsey v. Washington*, 301 U.S. 397, 401 (1937).

*Graham*, 450 U.S. 24 (1981); *Beazell v. Ohio*, 269 U.S. 167 (1925); *Thompson v. Utah*, 170 U.S. 343 (1898); *Duncan v. Missouri*, 152 U.S. 377 (1894); *Kring v. Missouri*, 107 U.S. 221 (1883). The Government's characterization of the service-connection requirement as merely a "procedural barrier", Government's Brief 26, is erroneous and, in any event, irrelevant. This Court has stated that "[a]lteration of a substantial right, however, is not merely procedural, even if the statute takes a seemingly procedural form. *Thompson v. Utah*, 170 U.S. 343, 354-355, 18 S.Ct. 620, 624, 42 L.Ed. 1061 (1898); *Kring v. Missouri*, [107 U.S. 221, 232, 2 S.Ct. 443, 452 (1883)]." *Weaver v. Graham*, 450 U.S. at 29 n.12.

There is no basis for the Government's suggestion that the Court of Military Appeals' decision was foreseeable, because the precedents petitioner relied upon are inconsistent with *Relford*. Government's Brief 27. The Government's claim that *McGonigal*, *Shockley*, and *Henderson*<sup>15</sup> decisions turned on the lack of a connection between the offenses and the accused's military duties, rather than the off-base location of the offenses, is most clearly belied by the *Shockley* case, which involved both on-base and off-base offenses. There, the on-base offenses were found to be, and the off-base offenses were found not to be, service-connected; a result clearly consistent with *Relford*.

Moreover, the Court of Military Appeals has not simply reconsidered its prior decisions in light of a consistent interpretation of *Relford*, as the Government implies. Government's Brief 27. What it has done, is reconsider its interpretation of *O'Callahan* and *Relford* so as to free itself to greatly expand court-martial jurisdiction beyond the constitutional limits set out in those cases. The *Relford* decision, which was rendered fifteen years ago, is not the reason for the Court of Military Appeals' recent departure from its earlier decisions. Rather, the Court of Military Appeals has stated that its departure is based on what it perceives to be

<sup>15</sup> *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

changed conditions. *United States v. Solorio*, 21 M.J. at 254-55, Pet. App. at 9a-10a.

The *McGonigal*, *Shockley*, and *Henderson* decisions are consistent with this Court's decisions in *O'Callahan* and *Relford* and are roughly contemporaneous with those decisions. Petitioner certainly could not foresee that the Court of Military Appeals would reject its own precedents and decide the instant case in a way that conflicts with *O'Callahan* and *Relford*.

Finally, the Government's reliance on *United States v. Ross*, 456 U.S. 798 (1982), is misplaced. Government's Brief 26. The issue being addressed in *Ross*, was the applicability of the doctrine of *stare decisis*, rather than any possible violation of due process, in the manner of an *ex post facto* law. 456 U.S. at 824. In any event, *Ross* does not stand for the proposition that accuseds may not rely on common law resulting from case by case determinations. See Government's Brief 26.

In *Ross*, this Court found that "[t]he exception recognized in *Carroll* is unquestionably one that is 'specifically established and well delineated.'" 456 U.S. at 825. Apparently it was that established and well delineated exception, rather than the cases offered by *Ross*, that warranted reliance. That is why the Court, in *Ross*, found that "no legitimate reliance interest can be frustrated by our decision today."<sup>16</sup> *Id.* at 824. There is no reason to believe that the Court meant to hold that any rule of common law can be changed retrospectively, regardless of its effect on accuseds, by courts or legislatures, without violating due process or the *Ex Post Facto* Clause.

Application of the Court of Military Appeals' decision, retroactively expanding court-martial jurisdiction, to petitioner is a violation of due process, in the manner of an *ex post facto* law. It has deprived him of a defense he had, barring trial by court-martial on the Alaska charges; consequently,

<sup>16</sup> As a practical matter, *Ross* could not have relied on *Robbins v. California*, 453 U.S. 420 (1981), or *Arkansas v. Sanders*, 442 U.S. 753 (1979), at the time he committed his crime, November 27, 1978, *Ross*, 456 U.S. at 800, anyway. *Sanders* was decided June 20, 1979, and *Robbins* was decided on July 1, 1981.

petitioner has been denied constitutional rights he would have been afforded in state court, and the punishment he faces has been enhanced.

8. For the reasons stated above, and in Petitioner's Brief, the judgment of the Court of Military Appeals should be reversed, and the trial judge's ruling dismissing the Alaska offenses for lack of subject-matter jurisdiction should be affirmed.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

RICHARD SOLORIO,

*Petitioner,*

v.

UNITED STATES,

*Respondent.*

**On Writ of Certiorari to the  
United States Court of Military Appeals**

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

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## QUESTIONS PRESENTED

1. Is the fact that the victim is a military dependent, without more, sufficient "service connection" to support the exercise of court-martial jurisdiction over an off-base civilian-type offense?

2. Was the decision below, which found court-martial jurisdiction in circumstances in which previous decisions had refused to do so, a plain violation of the rule of Bouie v. City of Columbia, 378 U.S. 347 (1964)?

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Interest of the Amicus

The American Civil Liberties Union (ACLU) is a nationwide nonpartisan organization of more than 250,000 members dedicated to the protection of constitutional rights. The ACLU has long taken an interest in the administration of criminal justice in the military, in addition to its general interest in the vindication of constitutional rights in civilian state and federal courts. Thus, the ACLU regularly appears as an amicus curiae in the United States Court of Military Appeals in cases that affect all the services.[1]

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1. Petitioner and respondent have consented to the filing of this brief. Copies of their letters have been filed with the Clerk.

### Summary of Argument

Under the service connection test of O'Callahan v. Parker, 395 U.S. 258 (1969), and Relford v. Commandant, U.S. Disciplinary Barracks, 401 U.S. 355 (1971), military jurisdiction over an off-base civilian offense cannot be predicated solely on the fortuity that the victim is a military dependent. Reliance on that single factor would deprive a potentially large class of defendants of important protections that are available only in the civilian courts, and would lead to arbitrary results that would not contribute to public confidence in the military justice system.

While the question presented here arises in the context of a Coast Guard

court-martial, the decision below affects all of the military services. As of March 31, 1985, there were 2,147,845 persons in uniform in the Army, Navy, Marine Corps and Air Force, of whom 1,398,779 were on active duty in the 50 States. As of September 30, 1984, there were 2,851,392 military dependents, of whom 2,462,222 were living in the 50 States.[2]

These data do not include dependents of military retirees. A subsequent decision of the court below, United States v. Scott, 21 M.J. 345 (C.M.A. 1986), appears to expand military

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2. See generally Dep't of Defense, Defense '85 Almanac 24-27, 31 (Sept. 1985). During Fiscal Year 1984, 12,009 persons were convicted by general or special courts-martial. 1984 Ann. Rep. of Code Comm. on Military Justice (1985).

jurisdiction over off-base civil offenses (at least where the accused is an officer) to cases where the victim is a dependent of a retired military person even though the rule had long been that such offenses against retirees themselves were not subject to court-martial jurisdiction. United States v. Armes, 19 C.M.A. 15, 41 C.M.R. 15 (1969). Dependents of retired military personnel number in the millions.

Thus, the decision below signals a geometric increase in the pool of persons against whom civil offenses may give rise to military prosecution. It correspondingly extends the reach of military jurisdiction beyond anything heretofore contemplated or even arguably justified by military needs. Reversal is

required to restore military jurisdiction to its proper limits.

Reversal is also required because a new rule was applied to Solorio in violation of the ex post facto component of Fifth Amendment due process. Solorio's off-base misconduct was not punishable by court-martial prior to the decision in this case, and the fact that it may have violated state law is immaterial.

#### Argument

##### I.

#### **THE VICTIM'S STATUS AS A MILITARY DEPENDENT IS INSUFFICIENT TO SUPPORT MILITARY JURISDICTION AND THE CORRESPONDING TRUNCATION OF SOLORIO'S CONSTITUTIONAL RIGHTS**

In Toth v. Quarles, 350 U.S. 11, 22 (1955), this Court held that military tribunals should be restricted "to the



narrowest jurisdiction deemed absolutely essential to maintaining discipline among the troops in active service." The decision below is irreconcilable with that exacting test.

The notion of service connection as a limitation on the jurisdiction of courts-martial was sound when it was announced in O'Callahan. It continues to be sound today. It is a notion that cannot be understood simply as the result of a weighing of the relative merits of the military and civilian systems of criminal justice. This is so because, notwithstanding O'Callahan's harsh assessment of the military justice system, 395 U.S. at 265-66, that decision is supported by constitutional considerations that would be present even

if all could agree that the substantive justice dispensed by the two systems were identical. These considerations include, first, the fundamental notion of civilian control of the military; second, the primacy of civilian authorities in general with respect to the maintenance of law and order within the country;[3] and third, the primacy of the States as regulators of individual conduct. The decision below simply disregards these important interests.[4]

The military and civilian

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3. See, e.g., Posse Comitatus Act, 18 U.S.C. sec. 1385 (1982).

4. In a very real sense, this is an a fortiori case for applying the service connection doctrine since the choice here is not between a federal court-martial and a federal civilian trial, as in O'Callahan, but rather between a federal court-martial and a state criminal trial.

criminal justice systems, however, are not comparable, much less identical. Although the Uniform Code of Military Justice ("UCMJ") has been amended several times since 1969, the changes wrought by Congress have not disturbed the basic arrangements that were in place when O'Callahan and Relford were handed down. It is of course to the good that this Court now has certiorari jurisdiction over at least some decisions of the Court of Military Appeals. 28 U.S.C. sec. 1259 (Supp. III 1985); UCMJ art. 67(h)(1), 10 U.S.C. sec. 867(h)(1) (Supp. III 1985). But other changes in the UCMJ can hardly be viewed as benefiting the accused. For example, the statutory right to request "reasonably available" counsel of one's own choice has been drastically narrowed by service regulations authorized under a

1981 amendment. See UCMJ art. 38(b)(7), 10 U.S.C. sec. 838(b)(7) (1982), added by Pub. L. No. 97-81, sec. 4(b), 95 Stat. 1088.

As in 1969, military defendants are still tried before judges who lack the minimal protection of a fixed term of office. Military juries still consist of as few as 3 or 5 members. Those jurors are still selected by commanding officers[5] and (except as to death sentences) need not be unanimous to reach a verdict. There is still no grand jury

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5. Section 3(b) of the Military Justice Act of 1983 permits the commander to delegate his power to excuse military jurors to legal counsel or any other principal assistant. UCMJ art. 25(e), 10 U.S.C. sec. 825(e) (Supp. III 1985). The change in no way insulates the selection process from command preferences.

or right to trial in the vicinage. Some of the armed services, in order to ensure zealous representation, have a separate command structure for defense counsel; others still do not.

Because the parties and other amici can be expected to review O'Callahan and Relford in some detail, we propose to focus on three points: (a) service connection approaches followed in other countries; (b) the proper limits of deference to military courts in deciding questions of service connection; and (c) the insubstantiality of the reasons adduced by the Court of Military Appeals for the vast expansion of court-martial jurisdiction represented by the decision below.

A.

The Experience Of Other Countries  
Teaches That A Service Connection  
Requirement Is Workable And Appropriate

Charting the appropriate boundary between military and civilian jurisdiction is a problem that has confronted other democracies.[6] Recognizing that such a boundary must be drawn does not, of course, imply a rejection of the legitimacy of the military justice system as an institution. While the process of

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6. Totalitarian governments do not recognize the problem. See, e.g., Statute on Military Tribunals art. 11(1), June 25, 1980, 1980 Vedemosti S.S.S.R., No. 27, item 546, reproduced in 4 Collected Legislation of the U.S.S.R. and Constituent Union Republics sec. VII-2 (W. Butler ed. 1983) and W. Butler, Basic Documents on the Soviet Legal System 166 (1983) (military courts given jurisdiction over all crimes by military personnel).



drawing the boundary necessarily involves a measure of imprecision, that process has worked reasonably well in this country. This Court can take some satisfaction from the fact that its decisions are consonant with the arrangements that have evolved in a number of other common law and noncommon law countries. Indeed, their persuasiveness has been directly influential in at least one instance. There is no reason to abandon those decisions or to deviate from the sound principles accepted by democratic societies the world over with which we share fundamental values.

For example, although by statute British courts-martial have jurisdiction over civil offenses other than treason,

murder, manslaughter, treason-felony, rape, genocide and biological weapons violations,[7] service regulations and Home Office instructions set forth detailed criteria for determining whether offenses by service personnel will be tried in civilian courts or military courts. See 41 Halsbury's Laws of England para. 362, at 334 n.4 (1983). According to the Manual of Military Law, ch. 7, para. 4,

. . . [t]he general principle is that an offence, whether committed on Ministry of Defence premises or not, which affects the person or property of a civilian should normally be dealt with by a civil court, but that an offence which involves only service personnel, their property or service property

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7. Army Act, 1955, 3 & 4 Eliz. 2, ch. 18, sec. 70(4); Air Force Act, 1955, 3 & 4 Eliz. 2, ch. 19, sec. 70(4).

should normally be dealt with by the military authorities. (Emphasis supplied.)

Implementing regulations add the following Relford-type factors for deciding whether a case should be tried in the civilian courts:

a. If the alleged offence is committed by a member of the forces who is about to be sent overseas, and particularly if there is reason to think it was committed in order to avoid such service, the police will normally hand the man over to the Service authorities unless it is a serious offence or one specifically excluded from the jurisdiction of the Service authorities or the circumstances are otherwise exceptional.

b. If the alleged offender was on duty at the time and the offence constituted a breach of that duty, the police will normally hand him over to the Service authorities even though the offence may affect the property of a civilian. This would not apply to a charge such as

dangerous driving which involves risk to the general public.

c. The Service authorities will generally deal with an offence committed by a member of the forces on Service premises, if it can be dealt with summarily, and was either a minor assault on a civilian or a minor offence against the property of a civilian.

d. If a Service offender has a civilian accomplice, proceedings against both will normally be taken in a civil court.

e. If the alleged offender is already the subject of a suspended sentence ('deferred sentence' in Scotland), a probation order, an order for conditional discharge or some other form of binding over by a civil court, any further offence will be required to be brought to the notice of the civil authorities, notwithstanding that it would otherwise normally be dealt with by the Service authorities. Queen's Regulations para. J7.007.

An even stricter rule of service

connection obtains in Scotland. "An offence committed in Scotland by a member of the forces while on duty or on Service premises which affects the person or property of a civilian will normally be dealt with by the procurator fiscal in the civil court notwithstanding" paragraphs b. and c. quoted above. Id. para. J7.012a.

A similar approach--the roots of which may be traced, at least in part, directly to O'Callahan[8]--is followed in Canada, where "military authorities . . . claim that they have been applying a concept of service connection for years

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8. See R. v. MacEachern, 63 Nat'l Rptr. 59, 61 (Can. Ct. Martial App. Ct. 1985); see also MacKay v. The Queen, 114 D.L.R.3d 393, 426 (1980) (McIntyre, J., concurring) (semble).

and that the O'Callahan test, were it adopted by a majority of the [Supreme Court of Canada], would have no practical effect."[9] To cite an illustration that bears some resemblance to the case at bar in the sense that it involves similar on-base and off-base misconduct, the Court Martial Appeal Court of Canada only last year held that there was no service connection over an off-base arson at a motel at which a serviceman stayed while enroute from one duty station to another, despite the fact that he had also committed arson at both his old and new duty stations. R. v. Catudal, 18 C.C.C.3d 189 (Ct. Martial App. Ct. 1985).

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9. Gold, Canadian Bill of Rights--Fair Hearing--Equality Before the Law--National Defence Act--Court-Martial Jurisdiction, 60 Can. B. Rev. 137, 144-45 n.36 (1982).



The same court, in MacEachern,  
supra, quoted with obvious approval from  
an able concurring opinion in MacKay,  
supra, as follows:

. . . In a country with  
a well-established judicial  
system serving all parts of the  
country in which the  
prosecution of criminal  
offenses and the constitution  
of courts of criminal  
jurisdiction is the  
responsibility of the  
provincial governments, I find  
it impossible to accept the  
proposition that the legitimate  
needs of the military extend so  
far. It is not necessary for  
the attainment of any socially  
desirable objective connected  
with the military service to  
extend the reach of military  
courts to that extent. 114  
D.L.R.3d at 424-25.

Nor are these simply isolated  
examples of the steps democratic  
countries have taken to guide the trial  
of civil offenses into the civilian

courts. Australia and New Zealand, for  
example, require the approval of their  
attorneys general before a court-martial  
may try charges of treason, murder,  
manslaughter, rape or bigamy committed  
within the country.[10] The attorney  
general of Israel has even broader  
powers: he may direct that any case be  
transferred where the offense was not  
committed within the framework of the  
defense force or in consequence of the  
accused's military status[11]--a test  
much like the one laid down in  
O'Callahan.

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10. Defense Force Discipline Act, 1982,  
sec. 63(1), 2 [1982] Austl. Acts P.  
2124; Armed Forces Discipline Act, 1971,  
sec. 74, 3 [1974] N.Z. Stat. 1519.

11. Military Justice Law, 1955, sec. 14,  
Laws of Israel, No. 54, 184, 189 (1957).

The Philippine Articles of War, which were directly influenced by American legislation, permit court-martial jurisdiction for civil offenses only on military bases or if all victims were subject to military law.[12] In Pakistan, while there is no formal service connection requirement, exceptions are made to that country's otherwise sweeping grant of court-martial jurisdiction where the offenses, like those at issue here, relate to the "property or person of a civilian or are committed in conjunction with a civilian or if the civil authorities intimate a

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12. Art. of War 94, 2 Phil. Perm. & Gen. Stats. 246, 290 (G. Trinidad rev. ed. 1978).

13. Anwar, The Administration of Military Justice in the Pakistan Air Force, 61 Mil. L. Rev. 41, 54-55 & n.47 (1973).

desire to bring the case before a civil court." [13]

For its part, France in 1965 strictly limited peacetime domestic court-martial jurisdiction to military offenses and civil offenses occurring on base or incident to service.[14] As a practical matter, the French statute functions in much the same way as the service connection doctrine in this country.[15] While it provides considerably less guidance than

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14. Code de Justice Militaire art. 56, Loi No. 65-542, July 8, 1965, J.O. July 9, 1965, 2 [1965] Gaz. du Palais 44, 50, discussed in Ryker, The New French Code of Military Justice, 44 Mil. L. Rev. 71, 85 & n.63 (1969).

15. See generally P. Doll, Analyse et Commentaire du Code de Justice Militaire paras. 107-11, at 65-69 (1966) (collecting cases).

O'Callahan and Relford, the circumstances under which a French court-martial may try civil offenses have been described as well-defined.[16]

Finally, even countries not widely viewed as bastions of democracy have occasionally shown a sensitivity to the inappropriateness of trying civil offenses by court-martial. Thus, it appears that South Korean courts-martial have no jurisdiction over civil offenses,[17] and although South African courts-martial have concurrent jurisdiction over all but a handful of

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16. Ropers, Le Nouveau Code de Justice Militaire, 1966 Semaine Juridique No. 1992, para. 31.

17. Military Penal Code art. 1(1), 3 Laws of Rep. of Korea x-82 (4th ed. & Supp. 1984).

serious civil offenses,[18] in practice not only are some nonservice connected crimes tried in the civil courts,[19] but even some clearly military offenses are tried there as well,[20] despite occasional reminders by the civil courts that military offenses should be tried by the military.[21]

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18. Defence Act, 1957, sched. 1, Military Discipline Code sec. 59 (S. Afr.).  
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19. E.g., State v. Thompson, 4 [1975] S. Afr. L. Rep. 448 (Transvaal Div. 1975) (theft from civilian).

20. E.g., State v. Rouessart, 4 [1982] S. Afr. L. Rep. 250 (Natal Div. 1982) (unauthorized absence).

21. E.g., State v. Groble, 1 [1961] S. Afr. L. Rep. 63, 64 (Cape Div. 1960) (disobedience and violation of General Article); see also R. v. Russell, 11 Crim. Rep. 440 (B.C. 1951); R. v. Kirkup, 34 Crim. App. 150 (1950).



The purpose of presenting these foreign materials is to suggest, not that these are matters to be decided by a "show of hands" among the legal systems of the world, but rather that the approach adopted by this Court a generation ago is well within the experience of other nations--including some with substantial defense establishments--and, from a comparative standpoint, anything but a "sport in the law." Screws v. United States, 325 U.S. 91, 112 (1945) (plurality opinion).

B.

The Decision Below Is  
Entitled to Little Deference

In Schlesinger v. Councilman, 420 U.S. 738, 760 (1975), this Court noted that the impact of an offense on discipline and effectiveness, the

distinctiveness of the military interest in deterrence, and the ability of the civilian courts to vindicate that distinct interest are "matters as to which the expertise of military courts is singularly relevant." While this language has been read by the military as holding out the promise of virtually complete deference to military courts' decisionmaking, the opinion makes clear in the very next sentence that the role allowed to military judicial expertise is instead the rather limited one of informing review in the Article III courts. If there is a place for deference, it is a narrow one.

How a deferential policy should function in a case such as this is far from clear. Here, the trial judge was a

regular officer who, in addition to being a lawyer, had long years of "line" service, including command of a ship in the Vietnam War. He conducted an extensive evidentiary hearing, and found no service connection. Presumably his decision is entitled to deference, much like the decision of a district judge on a contested issue of fact.[22] In contrast, given the disregard by the Court of Military Review and by the "bobtailed"[23] Court of Military Appeals for the constraints imposed by the clearly erroneous rule, see

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22. Cf. United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985) (sustaining trial judge's factual findings in Art. 62 appeal), citing Marshall v. Lonberger, 459 U.S. 422, 432 (1983).

23. North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 615 (1975) (Blackmun, J., dissenting).

Pullman-Standard v. Swint, 456 U.S. 273 (1982), claims that the actions of those courts are entitled to deference in this context have a decidedly hollow ring.

It is impossible to examine the decision below without having to wonder--not merely about the degree of deference it should receive, but more importantly, at the legal wilderness into which the lower courts' distorted reading of O'Callahan and Relford would, if allowed to stand, necessarily lead.

Review of the specific factors put forward in support of the decision below only confirms this assessment. For example, in opposing certiorari at this stage of the case, respondent noted that "[i]t was revealed during the trial that one of the victims had considered

suicide." Opp. at 10 n.5. It claimed that this evidence was "relevant to the issue of jurisdiction." Id. at 10 & n.5.

There is, however, literally no basis for attributing to military courts or the Court of Military Appeals any expertise that might conceivably warrant "deference" on such matters. It requires no military expertise to evaluate suicidal ideation by a child. It requires no military expertise to evaluate whether a serviceman would be annoyed, or "put off", or made to feel sad if he or she knew that a fellow-serviceman were on trial for sexual misconduct involving another member's child. These are not intrinsically military matters, and most

certainly not the stuff of deference.

What is more, they are not the stuff of jurisdiction. Indeed, that respondent would think to mention a victim's consideration of suicide as bearing on jurisdiction demonstrates better than any hypothetical how amorphous and unworkable is the approach adopted by the court below. Such an approach thoroughly undermines predictability on jurisdictional issues (the most basic question in our legal system), and inevitably leads to arbitrary results, depending on happenstances such as whether the victim is a dependent or, if so, whether he or she has suicidal tendencies or was emotionally vulnerable. Cf. United States v. Armes, supra, at 16, 41 C.M.R.



at 16 (ownership of stolen car by retired officer was "happenstance" without military significance). Why should it make a difference, in terms of jurisdiction, if a child victim was the dependent of a member of the same armed service as an accused or of another branch of the service, as the decision below may fairly be read to permit?

Finally, the proposition advanced by the Court of Military Review and relied on by respondent in opposing certiorari, Opp. at 13, that the Coast Guard's district commander in Juneau (where there is no base to speak of) had the same responsibility for the welfare

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24. It is bad enough that the legal lexicon now includes the mysterious "non-bank bank" and the even more mysterious "non-evidence evidence."

of dependents of his subordinates[24] can only be treated as implausible.

Amenability to trial by court-martial should not turn on such "illogical and fortuitous contingencies," United States ex rel. Hirshberg v. Cooke, 336 U.S. 210, 214 (1949), such as those implicit in the decision below.

C.

The Reasons Given For The Decision Below  
Do Not Withstand Scrutiny

Not one of the bases asserted by the Court of Military Appeals withstands serious scrutiny or represents a material change from conditions in effect when O'Callahan was decided.

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Sanderlin v. United States, No. 85-5668 (D.C. Cir. July 3, 1986) (Silberman, J., dissenting), slip op. at 2 n.l. Respondent's argument would add the "non-base base."

1. The court relied on the "recent development in our society" of "an increase in the concern for victims of crimes." 21 M.J. at 254. It is clear that such an increase in concern for victims has occurred. See generally J. Stark & H. Goldstein, The Rights of Crime Victims (1985). There is, however, nothing peculiar to the military in this evolution, and nothing in the Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1248, cited at 21 M.J. 255 n.2, the relevance of which was neither briefed nor argued below, suggests that Congress intended it to be the fulcrum for an expansion of court-martial subject matter jurisdiction. As noted by a member of the staff of the Army's Judge Advocate General's School, "no provision of th[at]

Act affected the rights of the criminal defendant." Kaczynski, A Helping Hand: The Victim and Witness Protection Act of 1982, Army Lawy., Oct. 1984, 24, 30.

Alaska has its own legislation for the protection of victims and for their participation in the criminal and parole processes. Alas. Stat. secs. 12.55.022, 12.55.025, 12.61.010, 33.15.065 (1984).

2. The court suggested that the distraction or emotional upset associated with the potential knowledge that a servicemember had committed sexual misconduct with a child would impede others' performance of military duty. This is far too elusive a test for determining whether military jurisdiction exists. Military jurisdiction is not a

"family" affair, Opp. at 2a, whose parameters are to be decided by how distraught the victim's relatives (or, for that matter, friends) may be. Many kinds of off-base events could conceivably have an adverse impact on morale, see 21 M.J. at 256, but that is an insufficient foundation for carving an exception to the rule of O'Callahan and Relford that civil offenses should be punished by civil authorities.

3. The right to grand jury indictment is protected under Alaska law, Alas. Const. art. I, sec. 8, trial by jury is available, and (with the exception of magistrates whose criminal jurisdiction is limited to misdemeanors) Alaska's trial and appellate judges (unlike military trial and intermediate

appellate judges) enjoy the protection of a term of office. The record is clear that the Alaska offenses could have been prosecuted by the State. Similar offenses had been so prosecuted in the recent past, and the State prosecutor did not refuse to prosecute Solorio. Rather, playing "Alphonse" to the Coast Guard's "Gaston," he "deferred" to the military. But Solorio's rights under State law and the Fourteenth Amendment cannot be waived by a State prosecutor. See generally H. Moyer, Justice and the Military 197 (1972).

4. The fact that Solorio and the Alaska victims were no longer in Alaska, 21 M.J. at 257, is irrelevant. They left pursuant to military orders. The military cannot now use the



transfers--even if done in the ordinary course of business--as a basis to bootstrap the exercise of military jurisdiction over offenses that otherwise could not have been subject to that jurisdiction. Moreover, in our increasingly mobile society, State prosecutors have to deal with out-of-state defendants and witnesses every day in the week. There is nothing unusual (much less unique), therefore, in the hurdle that faced the Alaska prosecutor.

5. Similarly, the fact that witnesses might have to testify twice, or that separate State and federal rehabilitation programs might be available, 21 M.J. at 257-58, is scarcely unique to the setting of this case.

Precisely the same circumstances exist whenever an individual is prosecuted by both State and federal authorities or by two States. The military is covered by the Interstate Agreement on Detainers, 18 U.S.C. App. sec. 5 (1982); United States v. Greer, 21 M.J. 338, 340 (C.M.A. 1986), [25] one of the purposes of which is "to aid in rehabilitation efforts by securing a greater degree of certainty about a prisoner's future." 32 C.F.R. sec. 720.15(a) (1985); see Interstate Agreement art. I.

Congress has also directed, in Article 14(b) of the UCMJ, that delivery of a sentenced military prisoner to civil

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25. Alaska is also a party to the Interstate Agreement. Alas. Stat. sec. 33.35.010 to -.040.

authorities, "if followed by conviction, interrupts the execution of the sentence of the court-martial." 10 U.S.C. sec. 814(b)(2) (1982); see also R.C.M. 1113(d)(2)(A)(ii). The purposes of this provision are "avoiding any conflict with the concurrent sentencing of civil courts and preserving intact independent military sentencing." Edwards v. Madigan, 281 F.2d 73, 77 (9th Cir. 1960). The concern that animated the court below with respect to rehabilitation programs, therefore, is one that Congress has already addressed and resolved without the jurisdictional voraciousness implicit in the decision on review in this case.

6. The notion that the Coast Guard prosecutor might have wanted to use the Alaska offenses as evidence of other

crimes under the military equivalent of Rule 404(b) of the Federal Rules of Evidence, even if those offenses were not before the court-martial for trial, 21 M.J. at 257-58, is irrelevant to the question of service connection. Subject matter jurisdiction determines the scope of what may be proven at trial, not vice versa.

7. Finally, there is no such thing as "pendent" court-martial jurisdiction, any more than there is "pendent" district court jurisdiction over State crimes committed by an individual who has also violated some federal law. The decision below pays lip service to the point, 21 M.J. at 257, but violates it in fact. Until United States v. Lockwood, 15 M.J. 1 (C.M.A. 1983)

(2-1), which was never examined in this Court because it was decided before Congress expanded the certiorari jurisdiction, the Court of Military Appeals had consistently honored this principle by reversing off-base portions of cases other portions of which were service connected.[26] Corrective action by this Court is necessary to nip this new and disturbing approach in the bud.

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In these times of increased concern about the arrogation of power to the Federal Government at the expense of

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26. E.g., United States v. Shockley, 18 C.M.A. 610, 40 C.M.R. 322 (1969); cf. Fleiner v. Koch, 19 C.M.A. 630 (1969)(mem.), noted in Justice and the Military, *supra*, at 179; see also *id.* at 178 (collecting cases); cf. R. v. Catudal, *supra*.

the States, this Court should be slow to approve a new rule that injects the Federal Government (and especially the military) into an area of interpersonal conduct that historically has been the responsibility of State and local authorities. Nor is it readily apparent that public policy is advanced by a rule that needlessly increases the insularity of the military. The decision below accelerates the transformation of the military and its enormous dependent community into a "khaki ghetto" ever further removed from the larger society it serves, without conferring any corresponding benefit on the military or society.

O'Callahan and Relford impose no costs on the military in terms of



discipline or otherwise. On the contrary, from a fiscal standpoint, it is fair to assume that overruling those cases would impose on the armed services additional requirements for investigative, legal, paralegal, stenographic, judicial and correctional personnel due to the increased caseload.

From a disciplinary standpoint, civil offenses, unlike, for example, violations of uniform regulations, see Goldman v. Weinberger, 475 U.S. \_\_\_\_ (1986), by definition do not implicate the hierarchical considerations on which the command structure rests. Regardless of the outcome of this case, many nonservice connected offenses will continue to be prosecuted by the military under the petty offense and overseas

exceptions. E.g., United States v. Holman, 21 M.J. 149 (C.M.A. 1985) (mem.), cert. denied, No. 85-963 (U.S. Jan. 13, 1986).[27] As for the remainder, once it becomes clear that this Court will not permit military and civilian authorities to negotiate away the rights of defendants, and that some offenses would go unpunished if civilian authorities decline to prosecute, it is to be expected that the kind of "deferring" attempted by the Alaska prosecutor in this case will stop.

The lines of responsibility for prosecution of civil offenses by military

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27. For serious civilian offenses, service regulations provide for administrative discharge on grounds of misconduct. 32 C.F.R. Pt. 41, App. A, sec. K(1)(a)(3) (1985).

personnel must be clear so that all who are involved will know their rights and duties, and will not be tempted to barter cases according to the shifting sands of momentary convenience or public outcry (or, as here, the lack thereof). Sexual misconduct in Juneau is the district attorney's concern, not the Coast Guard's.

The Court of Military Appeals "did not enthusiastically embrace the lessening of its jurisdiction" under O'Callahan. Willis, The United States Court of Military Appeals--"Born Again," 52 Ind. L.J. 151, 155 (1976). From the beginning, the military and its partisans complained that the decision was unwise because of the uncertainty it allegedly caused as to the contours of

court-martial jurisdiction. In fact, however, the service connection rule, particularly with the Relford gloss, quickly evolved into a well-defined set of rules.[28]

The real basis for concern over uncertainty, as it happens, is not one of unclear line-drawing, but rather the impact of extraordinary personnel

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28. The only area of uncertainty had involved off-base drug offenses, and that uncertainty has been dispelled by the Court of Military Appeals' recent decisions addressed specifically to that problem. The ACLU does not concede the correctness of the sweeping approach employed by the court below in the narcotics area, but that issue is not before the Court in this case. The Court Martial Appeal Court of Canada has also declined to embrace that approach. R. v. MacEachern, supra, at 63.

29. See generally Dep't of Defense, Office of General Counsel, Reform of the Court of Military Appeals 14-18 (1979) (discussing instability and

turbulence on a 3-member court. [29]  
Since 1969, 10 judges have sat on the  
Court of Military Appeals. In these  
unusual circumstances, the need for  
judicial restraint and adherence to stare  
decisis--always strong in criminal  
law--is unusually compelling.[30] The  
Court should not be misled into believing  
that the root of the difficulty in the  
decision below is inherent in either  
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unpredictability due to personnel  
turnover).  
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30. See generally Hearings on H.R. 6406  
and H.R. 6298 (Revision of the Laws  
Governing the U.S. Court of Military  
Appeals and the Appeals Process) Before  
the Military Personnel Subcomm. of the  
House Armed Services Comm., 96th Cong.,  
2d sess. 54-55, 63 (1980) (testimony of  
Robert L. Gilliat, Assistant General  
Counsel, Dep't of Defense, and Maj. Gen.  
Alton H. Harvey, Judge Advocate General  
of the Army). The need for restraint is  
even stronger, of course, when there is a  
vacancy on a 3-member court. See id. at  
77, 79 (testimony of Fletcher, C.J.).

O'Callahan or Relford. It is emphatically  
not.

## II.

**BECAUSE THE DECISION BELOW OVERRULED  
PRIOR DECISIONS REFUSING TO PERMIT  
COURT-MARTIAL JURISDICTION TO BE  
PREDICATED SOLELY ON THE VICTIM'S  
STATUS AS A DEPENDENT, IT WAS A  
VIOLATION OF DUE PROCESS TO APPLY  
A DIFFERENT RULE TO SOLORIO**

In addition to violating the  
principles of O'Callahan and Relford, the  
decision below is a textbook illustration  
of the practice of retroactive  
criminalization condemned in Bouie v.  
City of Columbia, 378 U.S. 347 (1964),  
and Marks v. United States, 430 U.S. 188  
(1977). A statute simply cannot be  
reconstrued by a court to criminalize  
conduct previously held not to be  
proscribed and the new gloss applied to  
the very case in which the change is



announced. Hence, even if the Court of Military Appeals' expansive view of service connection were correct, Solorio's conviction as to the offenses said to have occurred in Alaska would nonetheless have to be set aside.

In opposing certiorari, respondent offered three arguments in an effort to elude Bouie and Marks. Opp. at 18-20. The first was that Solorio failed to raise the issue below. The second was that he cannot claim surprise because (a) on its face the UCMJ proscribes the conduct for which he was convicted, and (b) that conduct in any event violated Alaska law. The third was that the decision below was fairly predictable because the Court of Military Appeals "had indicated that its pre-Relford

decisions would be reconsidered in light of that case" and "had made it clear after Relford that some off-base offenses would be subject to court-martial jurisdiction." Opp. at 20, citing United States v. Lockwood, supra. None of these arguments has any validity.

1. In view of the grant of certiorari, the ACLU assumes that Respondent's suggestion that the Bouie issue cannot be raised in this Court for the first time, Opp. at 18, is "water over the dam." In any event, that argument disregards the very nature of that issue. Solorio could only have raised the Bouie issue after the Court of Military Appeals departed from its own precedent and applied the new rule to him. Since there is no duty to seek

reconsideration below as a precondition to obtaining review in this Court,[31] he cannot be faulted for failing to argue the Bouie issue in the Court of Military Appeals.

Moreover, if respondent's argument were correct, every state, federal and military defendant would be compelled to make a pro forma protective Bouie motion cautioning that the law should not be altered to his detriment. Such a request would be a remarkable waste of time and effort in the vast majority of cases, and the requirement would prove to be merely a trap for the

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31. See, e.g., Local 174, International Brotherhood of Teamsters v. Lucas Flour Co., 369 U.S. 95, 98-101 (1962); Market Street R. Co. v. Railroad Commission, 324 U.S. 548, 551-52 (1945); Southern R. Co. v. Clift, 260 U.S. 316 (1922).

unwary.

2(a). The fact that the UCMJ on its face purports to proscribe the types of conduct for which Solorio was convicted does not satisfy the requirements of due process. Like any other criminal statute, the UCMJ has developed a substantial judicial gloss which enjoys equal dignity with the words enacted by Congress. That gloss has grown up over the thirty-five years since the statute was enacted, and the fact that such a gloss would be applied was and is fully in keeping with the congressional expectation. Congress created a civilian tribunal to help develop a body of decisional law interpreting the bare legislative text. See generally Willis, The United States Court of Military

Appeals: Its Origin, Operation and Future, 55 Mil. L. Rev. 39 (1972). It is a denial of this partnership between the legislative and judicial functions[32] to limit the inquiry, as respondent would have this Court do, to the plain text of the statute. By applying the ex post facto concept to judicial decisions through the due process clauses, Bouie and Marks necessarily teach otherwise.

If, therefore, Solorio was chargeable with knowledge of the terms of the UCMJ, for better or worse, he was equally chargeable with knowledge of the judicial gloss, for better or worse. In this case, as we explain below, the gloss

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32. See, e.g., UCMJ art. 67(g), 10 U.S.C. sec. 867(g) (Supp. III 1985) (requiring annual report to Congress).

in existence at the time of the Alaska offenses was such, under Bouie and Marks, as to preclude his trial in a court-martial for those offenses.

2(b). Nor would it make a difference, for purposes of those cases, if the gloss in question were cast in terms of jurisdiction rather than as one of the "elements" of the offense. For one thing, a plurality of this Court suggested in Gosa v. Mayden, 413 U.S. 665, 673-78 (1973) (Blackmun, J.), that O'Callahan was not, strictly speaking, a jurisdictional determination. But even if it were, that would hardly render the decision below immune to the command of Bouie and Marks. As the Ninth Circuit has observed, a court cannot "make a federal crime out of acts of a defendant which



prior to that time had not been federal crimes, but acts punishable under state law." Woxberg v. United States, 329 F.2d 284, 293 (9th Cir. 1964).[33] That is precisely what happened to Solorio.

Notwithstanding the position taken in respondent's opposition to the petition, our view has only recently received confirmation from the Department of Justice. "[A]fter exhaustive research on the subject," the Department earlier this year concluded that the ex post facto clause prevents the prosecution of Yasser Arafat under a 1976 federal

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33. See also United States v. Juvenile, 599 F. Supp. 1126, 1131 (D. Ore. 1984) ("retrospective establishment of federal jurisdiction violates the ex post facto clause").

34. 18 U.S.C. sec. 1116 (1982).

law[34] for the 1973 murders of the United States ambassador and charge d'affaires to the Sudan.[35] The Department's analysis relied, inter alia, on United States v. Juvenile, supra. [36]

3. Any suggestion that the decision below did not represent a substantial break from the precedents is

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35. See Letter from John R. Bolton, Assistant Attorney General, to Sen. Frank R. Lautenberg, Apr. 21, 1986; Memorandum from Lawrence Lippe, Chief, General Litigation and Legal Advice Section, Criminal Division, to Victoria Toensing, Assistant Attorney General, Apr. 17, 1986; Statement of Mark Richard, Deputy Assistant Attorney General before the Subcomm. on Security and Terrorism of Sen. Comm. on Judiciary, Apr. 23, 1986, at 4. (These documents will be included in Legal Mechanisms to Combat Terrorism: Hearings Before the Subcomm. on Security and Terrorism, Sen. Comm. on Judiciary, 99th Cong., 2d sess. (1986) (forthcoming).)

36. Lippe Memorandum, supra, at 8.

an "appeal to unreality." Sibbach v. Wilson & Co., 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting). In a series of cases, three of which are cited on page 254 of the decision,[37] the court below had held that service connection over off-base civil offenses could not rest solely on the victim's status as a military dependent.[38] Indeed, in Fleiner v. Koch, supra, the court unanimously granted a writ of prohibition barring the trial of charges of indecent assault on and indecent acts

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37. United States v. McGonigal, 19 C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, supra; United States v. Henderson, 18 C.M.A. 601, 40 C.M.R. 313 (1969).

38. See also United States v. Snyder, 20 C.M.A. 102, 42 C.M.R. 294 (1970) (off-base assault and involuntary manslaughter; held, no service connection), cited in Justice and the Military, supra, at 176.

with a civilian ward in civilian premises in San Diego. The Court of Military Appeals never suggested, until this case, that its decisions in McGonigal, Shockley, Henderson, Snyder or Fleiner were not good law. As one popular summary of military law stated the rule, "the mere fact that the victim is a servicemember or a military dependent will not automatically establish service-connection." R. Rivkin & B. Stichman, The Rights of Military Personnel 21 & n.3 (1977), citing United States v. Hedlund, 2 M.J. 11 (C.M.A. 1976).

United States v. Trottier, 9 M.J. 337 (C.M.A. 1980), was cited below for the proposition that "some of our earlier opinions on service connection

should be reexamined in light of more recent conditions and experience." 21 M.J. at 254 & n.1. It is not enough to contend, however, that earlier decisions had put the world on notice that the entire body of law on service connection was open to question and could no longer be relied on.[39] Such an approach would be the antithesis of the fair warning that is essential to the administration of criminal justice in a free society.

Trottier was a narcotics case and in no way afforded Solorio or anyone else

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39. Thus, one of the few treatises on military law noted, after Trottier, that "[w]hile the court's position on drug offenses potentially indicates an expansion of subject matter jurisdiction, it is not safe to assume that the court will endorse a wholesale readoption of per se service connection rules." D. Schlueter, Military Criminal Justice: Practice and Procedure 136 & n.8 (1982).

fair notice that the unbroken line of precedent on the precise point here in issue was no longer valid, or represented an area in which one proceeded at one's own risk, so to speak. The Trottier opinion, which was joined by only two of the judges (the third concurred in the result), went so far as to point out that "drug offenses, through their debilitating effects, have a relevance to combat readiness that rape or robbery normally do not." 9 M.J. at 346 n.22. Far from alerting the reader that sex offenses such as those of which Solorio has been convicted would fall under the same rule, such a comment clearly limited the holding and set narcotics cases aside as a special category.

Events subsequent to Trottier



confirm that the victim's status as a dependent has continued to be deemed insufficient to warrant trial by court-martial for off-base offenses that are civilian in character. For example, even after the time of the offenses of which Solorio was convicted (and while this case was wending its way through the appellate process), a Navy judge dismissed charges of off-base forcible sodomy and assault of an accused's wife. See United States v. Wilson, 21 M.J. 381 (C.M.A. 1985)(mem.). The government obtained a reversal from the Court of Military Review, but the accused appealed to the Court of Military Appeals, which granted a stay. The case was ultimately mooted when Wilson was discharged from the service, but the trial judge's action and the Court of Military Appeals' stay

can hardly be reconciled with the claim that Solorio was on notice that his conduct violated the UCMJ.

Moreover, Wilson's wife was herself on active duty with another branch of the service. That charges involving off-base misconduct against a dependent who was also literally a member of the military could be dismissed by a trial judge, and that the Court of Military Appeals would stay the trial pending disposition of the government's interlocutory appeal, calls even more strongly into question any contention that Solorio was on notice from the Court of Military Appeals' post-Relford decisions that his misconduct with a mere

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40. Respondent's assertion that "Relford held that the status of a victim as a

dependent was service connected.[40]

Finally, even the latest edition of the Manual for Courts-Martial, drafted by the Defense Department, gives no indication that the unbroken line of cases on dependent victims was in doubt. Manual for Courts-Martial, United States, 1984 at II-14 to -15. The official "Discussion" of service connection makes no reference to dependency as a factor favoring the exercise of court-martial jurisdiction, id. at II-14, para. 203(c)(5), and the corresponding

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dependent of a serviceman is an important consideration in determining whether an offense can be subject to court-martial jurisdiction (401 U.S. at 366)," Opp. at 17, is inaccurate. Neither the page cited nor the opinion as a whole stand for that proposition. Relford's crimes occurred on-base, and we suspect respondent would defend the exercise of court-martial jurisdiction even if the victims had been mere tourists visiting Fort Dix and McGuire Air Force Base.

drafters' analysis cautions that "[w]hether the military status of the victim or the accused's use of a military identification card can independently support service-connection is not established by the holding in Lockwood." Id. at A21-11. Without in any way conceding that fair notice within the meaning of Bouie could have been provided by the President through the Manual for Courts-Martial, it is clear that even this type of notice was not in fact provided.

#### Conclusion

For the foregoing reasons, the decision of the Court of Military Appeals should be reversed and the case remanded with instructions to dismiss the Alaska specifications.

Respectfully submitted,

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1986

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RICHARD SOLORIO  
Yeoman First Class, U.S. Coast Guard,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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**On Writ Of Certiorari To The  
United States Court Of Military Appeals**

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**BRIEF OF THE APPELLATE DEFENSE DIVISION  
UNITED STATES NAVY-MARINE CORPS  
APPELLATE REVIEW ACTIVITY  
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

---

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**QUESTIONS PRESENTED**

1. Whether the United States Court of Military Appeals has slowly expanded court-martial jurisdiction thereby eroding the constitutional principle announced in *O'Callahan v. Parker*?
2. Whether, in light of the changes in the military justice system, the constitutional principle announced in *O'Callahan v. Parker* is still valid?

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IN THE  
**Supreme Court of the United States**  
 OCTOBER TERM, 1986

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No. 85-1581

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RICHARD SOLORIO  
 Yeoman First Class, U.S. Coast Guard,  
*Petitioner,*  
 v.

UNITED STATES OF AMERICA,  
*Respondent.*

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On A Writ Of Certiorari  
 To The United States  
 Court Of Military Appeals

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BRIEF OF THE APPELLATE DEFENSE DIVISION  
 UNITED STATES NAVY-MARINE CORPS  
 APPELLATE REVIEW ACTIVITY  
 AS AMICUS CURIAE IN SUPPORT OF PETITIONER

---

Petitioner and Respondent have consented to the submission of this amicus curiae brief by the Appellate Defense Division. Copies of the consents have been filed with the Court.

INTEREST OF THE APPELLATE DEFENSE  
 DIVISION

The Appellate Defense Division represents convicted members of the Naval Service before the U.S.

Navy-Marine Corps Court of Military Review, the U.S. Court of Military Appeals and the U.S. Supreme Court. This representation is provided for by Article 70, Uniform Code of Military Justice, 10 U.S.C. § 870 (Supp. II 1984).

The Appellate Defense Division is the principal source of representation for all Navy and Marine Corps members convicted by court-martial and sentenced to a punitive discharge or more than one year's confinement. The decision of the court below is an unprecedented and unconstitutional expansion of court-martial jurisdiction. If allowed to stand, that decision will have an adverse impact on Navy and Marine Corps personnel by depriving them of the fundamental rights available in civilian courts.

### STATEMENT OF THE CASE

The facts are cogently and completely set out in the petition. Essentially, petitioner was charged with committing various sex offenses with two young girls. Some of the alleged offenses occurred while petitioner was stationed in Juneau, Alaska, while the others allegedly occurred after petitioner was transferred to Governors Island, New York. The court-martial was convened at Governors Island. At trial the defense successfully moved to dismiss the Alaska based charges for lack of subject matter jurisdiction. The Government appealed pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 (Supp. II 1984). The U.S. Coast Guard Court of Military Review reversed the military judge's ruling. *United States v. Solorio*, 21 M.J. 512 (C.G.C.M.R. 1985). Petitioner appealed to the U.S. Court of Military Appeals which affirmed the lower court's decision. *United States v.*

*Solorio*, 21 M.J. 251 (C.M.A. 1986). Petitioner was subsequently convicted of eight offenses committed in Alaska.

### SUMMARY OF ARGUMENT

In *O'Callahan v. Parker* the Court announced the constitutional principle that court-martial jurisdiction must be limited to those cases which are service-connected. In recent years, the U.S. Court of Military Appeals has eroded that principle by basing jurisdiction on the type of offense involved, rather than on a case by case analysis. Because the sacrifice of constitutional rights can only be justified by an overriding interest in maintaining discipline and order, the military should still be required to show that each individual case is service-connected before exercising jurisdiction.

### ARGUMENT

#### I. THE UNITED STATES COURT OF MILITARY APPEALS HAS SLOWLY ERODED THE CONSTITUTIONAL PRINCIPLE ANNOUNCED IN *O'CALLAHAN V. PARKER*.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), this Court first set forth the service-connection test for determining court-martial jurisdiction. The Court balanced the constitutional rights of trial by jury and indictment by grand jury with the military's need for discipline and obedience. Because courts-martial do not provide those constitutional safeguards, their ju-



risdiction can extend only to those offenses which are service-connected. *Id.* at 261.<sup>1</sup>

In *Relford v. Commandant*, 401 U.S. 355 (1971), this Court applied the service-connection test. The *Relford* Court applied several factors to the facts and determined that the offenses were service-connected.<sup>2</sup>

Following the *O'Callahan* and *Relford* decisions, the U.S. Court of Military Appeals began a strict application of the service-connection test. *United States v. Moore*, 1 M.J. 448 (C.M.A. 1976). The court frequently relied upon the factors enunciated in *O'Callahan* and *Relford* in ruling on subject-matter jurisdiction issues. *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977); *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976). Appli-

<sup>1</sup> The *O'Callahan* Court considered the following factors in determining whether *O'Callahan's* offenses were service-connected: his proper absence from the base, the commission of the offenses off base, the civilian status of the victim, the absence of military control over the location of the offenses and the availability of civilian courts to prosecute. *O'Callahan* at 273.

<sup>2</sup> The *Relford* Court enunciated the following factors: 1) the serviceman's proper absence from the base; 2) the crime's commission away from the base; 3) its commission at a place not under military control; 4) its commission within our territorial limits and not in an occupied zone of a foreign country; 5) its commission in peacetime and its being unrelated to authority stemming from the war power; 6) the absence of any connection between the defendant's military duties and the crime; 7) the victim's not being engaged in the performance of any duty relating to the military; 8) the presence and availability of a civilian court in which the case can be prosecuted; 9) the absence of any flouting of military authority; 10) the absence of any threat to a military post; 11) the absence of any violation of military property; 12) the offense's being among those traditionally prosecuted in civilian courts. *Relford* at 356.

cations of those factors resulted in determinations that many offenses were not service-connected.<sup>3</sup>

In *United States v. Trottier*, 9 M.J. 337 (C.M.A. 1980), the Court of Military Appeals departed from its strict adherence to the *O'Callahan-Relford* factors. Instead of applying the principle announced in *O'Callahan* to the specific facts of the case, the court based its ruling on the type of offense involved. *Trottier* was convicted of three offenses involving the sale of narcotics. Two of the offenses took place off base. *Trottier* at 337. In ruling that all of the offenses were service-connected the court concentrated on the military's drug problems and the need for maintaining a drug free military environment. *Id.* at 345-350. That need is so great, the court concluded, that "very few drug involvements of a service person will not be service-connected." *Id.* at 351. The court identified two drug related offenses which might not be service-connected:

[I]t would not appear that use of marijuana by a service person on a lengthy period of leave away from the military community

<sup>3</sup> 3. See *United States v. Strangstalien*, 2 M.J. 81 (C.M.A. 1979) and *United States v. Williams*, 2 M.J. 81 (C.M.A. 1976) (off base drug offenses held not service-connected after application of *O'Callahan-Relford* factors); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979) (off base use of marijuana by an officer, in the presence of enlisted members under his command, not service-connected). See also *United States v. McGonigal*, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969) (all holding that off base sex offenses against military dependents were not service-connected).



would have such an effect on the military as to warrant the invocation of a claim of special military interest and significance adequate to support court-martial jurisdiction under *O'Callahan*. Similarly, the interest of the military in the sale of a small amount of a contraband substance by a military person to a civilian for the latter's personal use seems attenuated.

*Trottier* at 350 n.28 (citations omitted).

The U.S. Court of Military Appeals subsequently expanded court-martial jurisdiction to include the first of the above situations. In *United States v. Brace*, 11 M.J. 795 (C.M.A. 1981), the court again concentrated on the nature of the offense and held that court-martial jurisdiction existed over an accused's off base use of marijuana 275 miles from his duty station. Finally, in *Murray v. Haldeman*, 16 M.J. 74 (C.M.A. 1983), the court held that if a servicemember returns to a military installation subject to any physiological or psychological effects of a controlled substance, then the use of that drug, regardless of the duration of the absence or the location of the use, is service-connected. Thus, the lower court has essentially made any drug offense punishable by court-martial, in total disregard of the *O'Callahan-Relford* mandate to determine military jurisdiction based on the specific facts of each case.

In *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983), the court once again departed from a strict application of the *O'Callahan-Relford* test. Rather, the *Lockwood* court created its own factors in determining

that an off base forgery and larceny were service-connected.<sup>4</sup>

In *United States v. Scott*, 21 M.J. 345 (C.M.A. 1986), the court included the accused's status as an officer as a factor in determining that an off base offense was service-connected. While Chief Judge Everett, writing for the court, stopped short of holding that *all* officer misconduct is service-connected, Judge Cox in his concurring opinion stated that officer misconduct is always service-connected. *Id.* at 347 and 350. Just as *Trottier* created a nearly *per se* rule regarding drug offenses, the *Scott* decision creates nearly automatic subject matter jurisdiction if the accused is an officer.

Finally, in *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), the court has created automatic subject matter jurisdiction for a third category of cases: sex offenses against dependent children. *Solorio* at 256. This continuing trend of the lower court to make the service-connection test applicable to "types" of offenses rather than applying the *O'Callahan-Relford* analysis must stop. By categorizing military cases and creating *per se* rules of subject matter jurisdiction the lower court has slowly circumvented the *O'Callahan* Court's constitutional principle that military jurisdiction should be limited to only those offenses that are service-connected. Furthermore, the *Lockwood* court's reliance on damage to the military's reputation has

<sup>4</sup> The *Lockwood* court considered such factors as: the adverse impact off base crimes have on morale, readiness and the military's reputation in the civilian community, the use of a Government identification card during the offenses and the military's policy of trying all known offenses at a single trial. *Lockwood* at 9-10.

the potential to make any offense service-connected. Theoretically, any offense committed by a service-member off base lowers the military's esteem. The lesson of *O'Callahan* and *Relford* is that the determination of what cases may or may not be service-connected must be made on a case by case analysis. By holding that drug offenses, sex offenses against dependent children, offenses committed by officers and offenses that lower the military's esteem are automatically service-connected, the lower court has actually expanded court-martial jurisdiction, thereby eroding the constitutional principle that military jurisdiction must be limited to that which is absolutely necessary to maintain discipline and order.

## II. THE CONSTITUTIONAL PRINCIPLE ANNOUNCED IN *O'CALLAHAN V. PARKER* IS STILL VALID.

The fifth amendment of the Constitution provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V. In addition, the sixth amendment provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed. . . ." U.S. Const. amend. VI. The Constitution gives Congress the power "to make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14. Pursuant to that authority, Congress has enacted the Uniform Code of Military Justice, 10 U.S.C. § 801 *et seq.* (1982), which establishes a system of courts-martial. This system, however, does not provide the constitutional protections available in civilian courts. *O'Callahan v. Parker*, 395 U.S. 258, 262 (1969).

*O'Callahan* was an Army corporal convicted by court-martial of various sex offenses committed off base in a leave status. The victim was a civilian with no military connections. *O'Callahan* filed a petition for a writ of habeas corpus arguing that the court-martial lacked jurisdiction to try him. In holding that the military was without jurisdiction, the *O'Callahan* Court balanced the constitutional rights protected by civilian courts with the exclusion of military cases from the fifth amendment and Congress' authority under article I, section 8.<sup>5</sup> The Court concluded that in order for the military to have jurisdiction the accused must not only be a service-member but the offense must also be service-connected. *O'Callahan* at 272.

<sup>5</sup> Significantly, the framers did not exclude "persons in the land and naval forces" from the fifth amendment's protections but "cases."



In reaching its holding the Court restated what it said in *Toth v. Quarles*, 350 U.S. 11 (1955), that:

We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. *Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise.* But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served. And conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that *military tribunals have not been and probably never can be constituted in such way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.*

*Id.* at 262 (emphasis added) (quoting *Toth v. Quarles*, 350 U.S. 11, 17 (1955)). The Court further recognized the limitations of military courts in that:

A court-martial is tried, not by a jury of the defendant's peers which must decide unanimously, but by a panel of officers empowered to act by a two-thirds vote.

The presiding officer at a court-martial is not a judge whose objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition, but is a military law officer. Substantially different rules of evidence and procedure apply in military trials. Apart from those differences, the suggestion of the possibility of influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger.

A court-martial is not yet an independent instrument of justice but remains to a significant degree a specialized part of the overall mechanism by which military discipline is preserved.

*Id.* at 263-65 (footnote omitted).<sup>6</sup> Because of those limitations and the absence of important constitutional protections, the *O'Callahan* Court held that the jurisdiction of courts-martial must be limited to that necessary to fulfill the military's purpose—the maintenance of military readiness and discipline. *Id.* at 272.

<sup>6</sup> The provision authorizing a conviction by a two-thirds vote has recently been upheld. *United States v. Rojas*, 15 M.J. 902 (N.M.C.M.R. 1983), *aff'd*, 20 M.J. 330 (C.M.A. 1985).



**A. THE MILITARY JUSTICE SYSTEM STILL DOES NOT PROVIDE SUFFICIENT SAFEGUARDS TO WARRANT AN EXPANSION OF COURT-MARTIAL JURISDICTION.**

The *O'Callahan* Court enumerated many deficiencies in the military justice system:

For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries.

*O'Callahan* at 263. The Court also recognized that there is in the military system:

[T]he suggestion of possible influence on the actions of the court-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members. . . .

*Id.* at 264. Although many changes have occurred in the military justice system in the 17 years since *O'Callahan*, most of the conditions set forth above remain the same.

In 1980, the Military Rules of Evidence were promulgated. The military rules were taken in large part from the Federal Rules of Evidence with only minor changes.<sup>7</sup> In addition, improvements have been made

<sup>7</sup> The Military Rules of Evidence were adopted by the President on 1 September 1980. The drafter's analysis of many of the rules indicates that they were taken without change or *mu-*

in the quality of representation an accused receives. The accused is entitled to an appointed licensed attorney and may also retain a civilian attorney to represent him. Uniform Code of Military Justice, art. 38, 10 U.S.C. § 838 (1982). In the U.S. Marine Corps, however, the appointed counsel as well as the prosecutor are assigned to the staff of the convening authority. In the U.S. Navy, the defense counsel and the prosecutor do not work for the convening authority but both do work for the same person, a senior officer in the Judge Advocate General's Corps.<sup>8</sup> Thus, the prosecutor and the defense counsel in the U.S. Navy ultimately have their evaluations written by the same person.

Military judges still do not serve under the protection of life tenure. They are appointed by and serve at the discretion of the Judge Advocates General. Their salaries are controlled by Congress just as are the salaries of all military personnel.

The accused's commanding officer, the convening authority, is responsible for referring the charges to court. R.C.M. 306 and 404. He also selects officers (or at the accused's request senior enlisted personnel) from his own command to sit in judgment of the

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*tatis mutandis*, from the Federal Rules of Evidence. In addition, the Military Rules of Evidence include subjects not within the compass of the Federal Rules. See generally Saltzburg, Schinasi & Schleuter, *Military Rules of Evidence Manual*, Foreward (1981).

<sup>8</sup> Because in the U.S. Navy trial counsel and defense counsel work for the same command, attorneys can change roles every several months. That creates the potential for a conflict of interest. See *United States v. McArthur*, Misc. Dkt. No 85-11 (N.M.C.M.R. 29 Nov. 1985), Appendix A.

accused. R.C.M. 503. Therefore, the individuals who compose the panel have their evaluations prepared by the same person who originally decided that the accused should be court-martialed.<sup>9</sup>

Changes in the military justice system have resulted in improvements in the quality of military justice. However, many of the basic deficiencies recognized in *O'Callahan* have not been improved. Furthermore, regardless of the quantity or quality of improvements, the court-martial system will always be fundamentally and systemically different from the civilian criminal justice system. For those reasons, the exercise of court-martial jurisdiction should still be reserved for those cases having service-connection.

**B. THE SACRIFICE OF OTHER CONSTITUTIONAL AND STATUTORY RIGHTS BY SERVICE-MEMBERS HAS ALWAYS BEEN JUSTIFIED BY THE MILITARY'S NEED FOR DISCIPLINE AND ORDER.**

Military servicemembers "may not be stripped of basic rights simply because they have doffed their civilian clothes." *Chappell v. Wallace*, 462 U.S. 304 (1983) (quoting Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962)). Only when the military's need for discipline and order outweighs the interest protected, must a servicemember surrender the right.

In *Parker v. Levy*, 417 U.S. 733 (1974), the Court balanced the due process rights of the fifth amendment and the first amendment's protections of free expression with the military's special needs to main-

<sup>9</sup> But see Uniform Code of Military Justice, art. 37, 10 U.S.C. § 837 (1982) (a commanding officer is prohibited from basing a member's evaluation on his court-martial performance).

tain discipline and order. Levy, an Army captain, challenged his conviction for violating Articles 133 and 134, Uniform Code of Military Justice,<sup>10</sup> on the grounds that they were unconstitutionally vague and that they prohibited protected speech. In denying petitioner's claim, the Court stated that the standard for determining constitutional vagueness is less stringent when a military criminal statute is involved. *Parker v. Levy* at 756. The Court based its holding on the recognition that, as opposed to the goals of a civilian community, it is the primary purpose of the military to prepare for and fight wars. *Id.* at 743. Because of this special purpose, the military must have the tools necessary to enforce discipline and duty. Consequently, the individual rights of due process must fall in light of those overriding concerns. *Id.* at 744. The Court concluded that Congress may "legislate with greater breadth and with greater flexibility when prescribing rules which govern the military." *Id.* at 756.

In denying Levy's first amendment challenge, the Court again balanced a basic constitutional right against the military's special needs and interests. The Court justified the military's suppression of Levy's constitutional right with the military's "fundamental necessity for the imposition of discipline. . . ." *Id.* at 758. Because the military must be able to command obedience, servicemembers may not speak as freely as civilians.

<sup>10</sup> 10 U.S.C. § 933 and 934 (1982). Article 133 prohibits "conduct unbecoming an officer and a gentleman" while Article 134 prohibits all conduct prejudicial to good order and discipline or of a nature to bring discredit upon the armed forces.



Similarly in *Chappell v. Wallace*, 462 U.S. 296 (1983), the Court held that military members may not sue their commanding officers for violations of constitutional rights. In denying servicemembers this right, the Court again concentrated on the military's mission and the need for strict obedience and discipline to accomplish that mission. The Court concluded that the "unique disciplinary structure" of the military justified denying servicemembers legal recourse for the deprivation of constitutional rights.

Most recently, in *Goldman v. Weinberger*, — U.S. —, 106 S.Ct. 1310 (1986), the Court upheld a U.S. Air Force regulation prohibiting the wearing of any headgear while indoors. Goldman challenged the regulation, arguing that it prohibited religiously motivated conduct protected by the first amendment. The Court held that "to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps." *Goldman*, 106 S.Ct. at 1313. Therefore, because the regulation was necessary to the needs of the military for discipline and order, the first amendment right had to be sacrificed.

These precedents are consistent with *O'Callahan*. They all require the armed services to point to a legitimate military interest that must be protected in order to justify depriving a servicemember of a basic constitutional right. Absent that interest, there is no justification. The legitimate military interest common to these precedents is the need to maintain obedience, order and discipline.

Therefore, before a servicemember can be deprived of those rights he loses in trial by court-martial, the military must demonstrate that trial by court-martial is necessary to protect obedience, order and discipline,

i.e., that the offense is truly service-connected. Furthermore, *O'Callahan* and *Relford* make clear that this demonstration of service-connection must be based on an analysis of the facts of a specific case. The *O'Callahan* Court found that placing those limitations on the exercise of military jurisdiction was fully consistent with the fifth amendment's exclusion of "cases arising in the land or naval forces. . . ." Thus, the *O'Callahan* Court's holding that cases must be "service-connected" is consistent with the fifth amendment's language.

### CONCLUSION

The lower court has slowly eroded the constitutional principle announced in *O'Callahan*. Military jurisdiction is now based on the type of offense involved rather than an analysis of the specific facts of each individual case. The military, however, still does not provide the basic procedural safeguards and constitutional rights provided by civilian courts. This Court should reaffirm the constitutional principle that the military cannot force servicemembers to sacrifice their basic constitutional rights unless the military can demonstrate that the offense is service-connected.



Respectfully submitted,

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Captain, Judge  
Advocate General's  
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*Attorney of Record  
for Amicus Curiae*

SUSAN R. CORNELL  
Lieutenant, JAGC  
U.S. Naval Reserve

## APPENDIX

**APPENDIX**

**UNITED STATES NAVY-MARINE CORPS COURT  
OF MILITARY REVIEW**

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**Misc. Dkt. No. 85-11**

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UNITED STATES,

*Appellant,*

v.

JAMIE L. MCARTHUR

464 82 9661 Radioman Third Class (E-4) U.S. Navy,  
*Appellee.*

**GENERAL COURT-MARTIAL**

**OPINION OF THE UNITED STATES NAVY-  
MARINE CORPS COURT OF MILITARY REVIEW  
ON THE APPEAL BY THE UNITED STATES**

Decided 29 November 1985

LTCOL STEPHEN MITCHELL, USMCR, Appellate Gov-  
ernment Counsel

LT STEVEN P. BENSON, JAGC, USNR, Appellate Gov-  
ernment Counsel

MAJ MICHAEL E. CANODE, USMC, Appellate Defense  
Counsel

LT GARY K. VAN METER, JAGC, USNR, Appellate De-  
fense Counsel

PER CURIAM:

This case is now before us on appeal by the Government. A brief recitation of the proceedings to date will suffice at this stage to provide a frame of reference; additional



information will be added at the proper points in our analysis. In the course of preparing this case for trial Lieutenant S, the trial defense counsel, consulted his immediate superior, the Senior Defense Counsel (Lieutenant Commander M) regarding several particular aspects of defense strategy and problems, receiving specific advice in response. Later, Lieutenant Commander M's duties were changed to Senior Trial Counsel at the same Naval Legal Service Office. Lieutenant S, when he discussed this case with Lieutenant Commander M, was not aware that this reassignment would occur, and the record does not reveal whether Lieutenant Commander M had such knowledge. Lieutenant Commander M then performed the duties of trial counsel in this case from its earliest stages, accumulating evidence, advising the convening authority on the charges, serving the accused, representing the Government at the Article 32 (UCMJ) pretrial investigation, and acting as prosecutor during initial stages of the trial. Prior to pleading the appellant moved to dismiss the Charge or, in the alternative, to remove Lieutenant Commander M from trial counsel duties due to disqualification resulting from his earlier connection with the case. The military judge denied the motion to dismiss but granted the motion to disqualify Lieutenant Commander M as trial counsel. Lieutenant M then assumed duties as trial counsel. Subsequently, however, after further presentation of evidence and argument, the military judge announced that he was reconsidering the earlier motion to dismiss and granted the motion. The trial counsel then obtained a continuance and filed the instant appeal. We have determined that this case is within our jurisdiction as its resolution involves a question of law. Article 62(b), UCMJ.

We see two issues for resolution: (1) Was Lieutenant Commander M disqualified from acting as trial counsel and (2) is dismissal warranted? In regard to grounds for disqualification of counsel, Article 27(a)(2) points out. "... nor may any person who has acted for the defense act

later in the same case for the prosecution." The meaning of the phrase "person who has acted for the defense" is vital. Restricting application of the phrase to the conventional attorney-client relationship appears unwarranted, as the drafters could easily have so specified if that was their intent; the use of a more expansive phrase instead convinces us that the drafters intended to allow for a broad range of eventualities. This less-restrictive interpretation is echoed in the Discussion of R.C.M. 901(d), which explains that disqualification of an attorney may result merely from "duties or actions which are inconsistent with the role of counsel."

The Government has protested that liberality in construction of the phrase "acted for the defense" will torpedo the Naval Legal Service Office fleet. We are not inclined to accept the Government's alarmist assertions that the fate of the Naval Legal Service Office concept is at stake in this case. Such establishments have been in operation for a lengthy period with few problems of the present nature called to our attention, probably because an appreciation of the potential for conflict and the application of common sense have resulted in sound plans to avoid the type of conflict we see here. But, this very potential for conflict still cannot be ignored and instead necessitates scrupulous attention:

In the delicately balanced system of military justice, where potential for such situations is always present due to regular office assignment rotation, counsel sensitivity to this issue is particularly important. It is not enough, however, for the military lawyer to avoid any actual conflicts of interests, but also to avoid even the slightest appearance of impropriety.

*United States v. Hannon*, 19 M.J. 726, 728 (NMCMR 1984).

It is precisely this "appearance of impropriety" which is so vividly evident in the case at hand. Although the

appellant and appellee differ over many aspects of the case, they do agree that substantial matters bearing on the defense of appellee were discussed between Lieutenant Commander M, as senior defense counsel, and Lieutenant S. These included the appellee's denial of the allegations against her, the existence of blood in her room and a bloody towel, steps to obtain full discovery of Naval Investigative Service reports, methods to force a speedy trial, and drug-induced hypnosis to elicit information possibly repressed in the appellee's memory. They further agree that no privileged communications were revealed to Lieutenant Commander M and that he did not act in bad faith or out of improper motive in assuming as trial counsel after conferring while Senior Defense Counsel with the detailed defense counsel. Based on these facts we find that Lieutenant S committed no impropriety in discussing defense-related matters with Lieutenant Commander M, a fellow defense counsel, that Lieutenant S could reasonably believe that the information about appellee's case shared with Lieutenant Commander M would not be used adversely to appellee, and that Lieutenant Commander M, through these discussions, gained this information solely by reason of his status as senior defense counsel. Once in possession of this information Lieutenant Commander M could not reasonably be expected to expunge it from his memory, so he was under an obligation not to place himself in a position of apparent conflict. Although we have found no attorney-client relationship between Lieutenant Commander M and the appellee in the normal sense, no communication of privileged information from Lieutenant S to Lieutenant Commander M, and no apparent bad faith on the part of Lieutenant Commander M, we still have a set of circumstances which graphically raises the potential for conflict of interest, where an attorney comes into possession of substantial information about the defense case by virtue of his official position and consultation with the defense counsel, but then switches sides to prosecute the

case from its outset. Moreover, we cannot ignore the exhortations of *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), to resolve doubts in favor of the accused and of *United States v. Stringer*, 4 U.S.C.M.A. 494, 16 C.M.R. 68 (1954), to disqualify the trial counsel where the possibility of prejudice exists, without resorting to refined calculations as to the precise quantity of prejudice or its probable effect on the results of trial. See also Discussion to R.C.M. 901(d), *Manual for Courts-Martial*, 1984. For these reasons we find that Lieutenant Commander M "acted for the defense" and was therefore disqualified from service as trial counsel.

Next we examine the military judge's decision to dismiss the charge. In their briefs the appellant and the appellee have argued the doctrines of general versus specific prejudice. We see no need to enter this murky area of the law. See *United States v. Jerasi*, 20 M.J. 719 (NMCMR 1985) (*en banc*); compare *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955) with *United States v. Brooks*, 2 M.J. 102 (C.M.A. 1977). Instead, we are convinced that, as a matter of law, the military judge abused his discretion by imposing the draconian remedy of dismissal, when a less drastic means of relief was available. The issue before the military judge was not of the type that demanded dismissal as exclusive relief, see R.C.M. 907(b)(1), and the circumstances, even though serious, were not of the egregious sort which cry out for terminal disposition. Rather than dismissal, the proper remedy would balance the equities by allowing the government to continue with the proceedings but protect the appellee from any improper influence of Lieutenant Commander M's participation, and the exact nature of such protection would be determined by Lieutenant Commander M's involvement. Moving from general to specific, it logically follows from Lieutenant Commander M's disqualification at the trial itself that he is disqualified from participation at earlier stages of the case as well. This derives from the language



of Article 27(a)(2) which warns that someone who acts for the defense may not "act later *in the same case*," (not just at trial), thus imposing a flexible standard dependent on the exact circumstances. Based on the extensive involvement by Lieutenant Commander M from the earliest stages of this case we cannot discount the possibility that the information gleaned from his consultations with the trial defense counsel influenced his actions, even if subconsciously and unintentionally. Furthermore, the same appearance of impropriety results from Lieutenant Commander M's involvement at whatever stage.

We therefore reverse the decision of the military judge dismissing the charge and order that this case be returned to the convening authority, who may either (1) dismiss the Charge, or (2) forward the Charge to another convening authority who shall determine if further action on the Charge is appropriate. If alternative (2) is followed, the following constraints shall apply: (a) The transferee convening authority shall be neutral and have no prior knowledge of the case; (b) The transferee convening authority shall make an independent determination, completely free of influence from prior proceedings and any new proceedings must commence with a new preferral of charges; (c) The transferee convening authority may, in arriving at his disposition, consider only matters of factual/evidentiary nature and not the opinions/conclusions/work product of any prior trial counsel in the case; (d) Any new trial counsel shall have no access to this record, other earlier proceedings in the case, or work product of the prior trial counsels and the prior trial counsels in the case shall have absolutely no further involvement with it; (e) Our intent is that this case be treated as a new case, developed from its earliest stages without any taint whatsoever from the prior proceedings—all further proceedings must be governed by this intent and doubts shall be resolved by referring to this intent. We are aware from comments in the record that the statute of limitations may constrain further pro-

ceedings, presenting us with the option of dismissing the charges as a matter of judicial economy. As this matter was not fully expounded in the record we consider the convening authority in the best position to weigh the available alternatives and choose the fairest disposition.

/s/ John W. Kercheval II  
John W. Kercheval II, Senior  
Judge

/s/Michael D. Rapp, Judge  
Michael D. Rapp, Judge

See Concurring/Dissenting Opinion)  
John E. Grant, Jr., Judge



GRANT, Judge (concurring/dissenting):

I disagree with the majority that the relevant issues in this case can be resolved without squarely addressing the matter of specific versus general prejudice, and I will address such matters below after expanding on the summarization of evidence set forth in the majority opinion.

### SUMMARY OF EVIDENCE

The original trial counsel, Lieutenant Commander M, in his previous capacity as Senior Defense Counsel, was consulted by Lieutenant S, the appellee's former defense counsel, in regard to the proper defense strategy to be employed in the defense of the appellee. Lieutenant Commander M did not enter into an attorney-client relationship with the appellee, but did discuss with Lieutenant S, before preferral of charges, the Article 32 Investigation, and referral of charges to trial, matters which included the appellee's denial of wrongdoing and the advisability of subjecting the appellee to hypnosis. It was conceded by the appellee that no confidential communications related to Lieutenant S by the appellee were disclosed to Lieutenant Commander M, who subsequently was transferred to prosecution and specifically assigned as trial counsel at appellee's Article 32 investigation and court-martial. The trial judge initially denied appellee's motion to dismiss charges because of Lieutenant Commander M's prior participation as a defense consultant, but did disqualify Lieutenant Commander M from acting in a prosecutorial role, believing that any prejudice to appellee as the result of Lieutenant Commander M's prior relationship with Lieutenant S could be headed off by removing the source of prejudice.

Lieutenant M, was duly assigned to replace Lieutenant Commander M as trial counsel, and the matter might have ended there except that Lieutenant Commander M continued to operate in the background in support of the

prosecution of appellee. Lieutenant M admittedly utilized Lieutenant Commander M in an administrative capacity in preparing for trial, although Lieutenant M denied consulting with Lieutenant Commander M on strategy or in regard to any previous discussion between Lieutenant Commander M and Lieutenant S. To further complicate matters, Lieutenant M was alleged to have engaged in an *ex parte* conversation with the trial judge following the relief of Lieutenant Commander M and after having sought Lieutenant Commander M's counsel, in regard to matters involving the statute of limitations and the effect thereof should the trial judge require preferral of new charges pursuant to a defense motion; Lieutenant Commander M delivered a document to trial defense counsel, after his relief, denying the defense a material witness and allegedly misrepresented that the requested defense witness would no longer support the defense's position, which document Lieutenant Commander M prepared apparently before he was relieved as trial counsel; and finally, Lieutenant Commander M, after his relief, approached the defense counsel and requested that he agree to dispose a prospective witness.

Given these new revelations, the trial judge reconsidered and granted appellee's motion to dismiss. In dismissing the charges, however, the trial judge did not address the effect of Lieutenant Commander M's continued participation in the trial of appellee subsequent to his relief from duties as trial counsel, apparently because the trial judge was content to premise his decision on general rather than specific prejudice, citing *United States v. Green*, 5 U.S.C.M.A. 610, 18 C.M.R. 234 (1955), and the third prong of Judge Fletcher's concurring opinion, in *United States v. Brooks*, 2 M.J. 102 (C.M.A. 1977). The trial judge simply found that trial strategy was discussed in Lieutenant Commander M's conversation with Lieutenant S, when the former was a Senior Defense Counsel and the latter represented the appellee, and as it was impossible to de-

termine what subconscious use may have been made of such conversations by the prosecution in the pretrial stages of the court-martial, any doubt must be resolved in favor of the appellee by dismissing the charges.

# I

I do not share with the trial judge his interpretation of the *Green* case, nor do I believe that the facts in the case *sub judice* rise to the level of Judge Fletcher's third prong application of general prejudice in *Brooks*. *Green* involved a flagrant breach of the attorney-client relationship where the duly assigned defense counsel provided the staff judge advocate confidential information detrimental to his client's interest. In the case *sub judice*, Lieutenant S admittedly did not disclose any confidential communications of the appellee, but rather discussed trial strategy with the Senior Defense Counsel, and therefore, the extreme remedy of dismissal based on general prejudice is not mandated by *Green*. Secondly, *Brooks* generally stands for the proposition that where privileged communications are made to third persons outside the attorney-client relationship (The trial defense counsel made disclosures of a confidential nature to the military justice officer, who traditionally is a government representative), the test to be applied for dismissal is specific, not general, prejudice, and where an accused is convicted, under such circumstances, the conviction can be affirmed if the record demonstrates that the use made of the communication was harmless to the accused and that the conviction was otherwise valid. Judge Fletcher, in concurring in the result, would apply the doctrine of general prejudice only in three situations, namely, (1) where the defense counsel abandons his client; (2) where the government initiates the breach in a manner outside permissible legal confines; and (3) where the actions of the attorney so impregnate the proceedings as to make an appellate determination of extent of prejudiced impossible. In each of the three situations, according to Judge Fletcher,

"the very integrity of our judicial system and the concept of a fair trial are so violated as require this Court to dispose with a search for prejudice." In the case *sub judice*, the trial judge makes no specific factual determinations to support his conclusion that the actions of Lieutenant Commander M were so pervasive in nature as to inherently taint the entire proceedings and constitute prejudicial error *per se*. On the contrary, the trial judge failed to assess such actions and particularly declined to address the effects of Lieutenant Commander M's post-relief activities in this regard.

I cannot agree, as a matter of law, with the trial judge that it is impossible to assess the effects of Lieutenant Commander M's participation in pretrial proceedings for specific prejudice. The case file turned over to Lieutenant M by Lieutenant Commander M could have been reviewed and assessed for taint, and both Lieutenant Commander M and Lieutenant M were available to testify. Lieutenant Commander M's subsequent activities after being relieved as trial counsel also may be assessed for specific prejudice, as well as his prejudicial influence, if any, in the preferral of charges, the Article 32 investigation, and the referral of charges to trial, upon the proper presentment of evidence. The trial judge failed to address the issue of specific prejudice, although the competent evidence of record indicates that either on the motion or during the course of the trial, there was or would have been ample opportunity to assess the impact of Lieutenant Commander M's activities on the appellee's right to confidentiality in an attorney-client relationship and to determine whether any error in this regard prejudiced the rights of the appellee to a fair trial. The trial judge's reliance upon the unproven, subconscious thought processes of members of the trial team effectively emasculates the majority opinion in *United States v. Brooks, supra*, and goes far beyond Judge Fletcher's third prong invoking general prejudice, where, respectively, the trial judge did not pursue the search for



specific prejudice in Lieutenant Commander M's conduct and the record of trial does not contain such evidence to sustain a finding, as a matter of law, that Lieutenant Commander M's conduct so impregnated the proceedings as to make impossible appellate review on the extent of the prejudice. The teachings of *Brooks* would effectively be reduced to an assessment of specific prejudice by supposition, unfounded in fact, in sanctioning the trial judge's rationale.

Accordingly, I join with the majority in reversing the trial judge's dismissal of the charges, where the trial judge failed to address the issue of specific prejudice. Although I concur with the majority that Lieutenant Commander M was properly relieved by the trial judge from further participation as trial counsel for the reasons indicated in the majority opinion, I decline to adopt the further position of the majority: (1) requiring the convening authority to either dismiss the charges or defer to a new convening authority for action; (2) mandating the preferral of new charges should the new convening authority elect to proceed; and (3) imposing restrictions on the turnover of case records to the new trial counsel which go beyond obviating any taint occasioned by Lieutenant Commander M's past association with Lieutenant S and make any subsequent prosecution of the appellee extremely difficult. I would return the record of trial for further proceedings, where the matter of specific prejudice may be fully assessed and evidence of specific prejudice, if any, introduced on all matters relating thereto, including but not necessarily limited to the circumstances under which the original charges were preferred and referred to trial.

/s/ John E. Grant, Jr.  
John E. Grant, Jr.



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No. 85-1581

Supreme Court, U.S.

FILED

JUL 31 1986

JOSEPH F. SPANIOL, JR.  
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO  
YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF OF DEFENSE APPELLATE DIVISION,  
UNITED STATES ARMY, AS *AMICUS*  
*CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

I. WHETHER it is constitutionally permissible for the military to exercise court-martial jurisdiction over an offense which, upon application of the detailed analysis mandated by this Court, is not "service connected".

II. WHETHER any cogent or compelling reasons exist for the Court of Military Appeals to depart from a detailed application of the "service connection" test set forth by this Court in *O'Callahan* and *Relford*.

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## In the Supreme Court of the United States

OCTOBER TERM, 1985

RICHARD SOLORIO

YEOMAN FIRST CLASS, U.S. COAST GUARD, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT.

**BRIEF OF DEFENSE APPELLATE DIVISION,  
UNITED STATES ARMY, AS *AMICUS CURIAE* IN  
SUPPORT OF THE PETITIONER ON THE MERITS.**

The parties have consented to the submission of this *amicus curiae* brief by the Defense Appellate Division in support of the petitioner. Copies of the consents have been filed with the court.

**INTEREST OF THE DEFENSE APPELLATE DIVISION**

The Defense Appellate Division represents soldiers before the U.S. Army Court of Military Review, the U.S. Court of Military Appeals and the U.S. Supreme Court pursuant to Article 70(c), Uniform Code of Military Justice [hereinafter cited as UCMJ], 10 U.S.C. § 870(c) (Supp. 1986). The Division is the principal source of appellate representation for all convicted Army soldiers who are sentenced to a punitive discharge or confinement for one year or more. Defense Appellate Division attorneys typically represent over 2000 soldiers before the U.S. Army Court of Military Review annually.<sup>1</sup> The U.S.

<sup>1</sup> In 1984 and 1985 the Defense Appellate Division represented 2840 and 2241 soldiers, respectively, before the Army Court of Military Review. Defense Appellate Division, 1984 and 1985 Annual Reports. See generally Court of Military Appeals Annual Report and Appellate Reports of the Armed Services, 20 M.J. LXXV–LXXIX (1984) (Comparing appellate dockets of the Court of Military Appeals, the Courts of Military Review and the military appellate agencies).

Army is the largest armed service, having an active duty strength of 786,719 members for fiscal year 1985.<sup>2</sup> The Defense Appellate Division represents soldiers who have been<sup>3</sup> and will be adversely affected by the decision of the U.S. Court of Military Appeals in this case. If permitted to stand, the decision in this case will cause an expansion in the number of cases tried by the military and will potentially deprive a significant number of soldiers of fundamental rights and protections they would have enjoyed if prosecuted in Article III courts.

### STATEMENT OF THE CASE

The facts of this case are fairly discussed in the decision of the Court of Military Appeals, 21 M.J. 251 (C.M.A. 1986) and the decision of the Coast Guard Court of Military Review, 21 M.J. 512 (C.G.C.M.R. 1985).

### Summary of Argument

The military judge correctly identified the relevant service connection factors involved in this case and concluded that the military lacked jurisdiction over petitioner's Alaskan offenses. By manipulating the intent of the Court when it developed the service connection test, the United States Court of Military Appeals affirmed the lower court's reversal of the military judge and unconstitutionally found military jurisdiction over the Alaskan offenses. The lower courts failed to present any constitutionally convincing reasoning to justify departure from the traditional service connection test. This case is an example of the lower courts' recent decision to abandon a conscientious application of the service connection

<sup>2</sup> U.S. Army Courts-Martial/NJP Statistics, Report of The Judge Advocate General of the Army, submitted as part of the annual report of the U.S. Court of Military Appeals for fiscal year 1985, \_\_\_\_ M.J. \_\_\_\_ (1985).

<sup>3</sup> The government recently appealed one case which was dismissed at trial for lack of subject matter jurisdiction. Based on the decision below, the Army Court of Military Review reversed the military judge's ruling and reinstated the charges. *United States v. Abell*, Misc. Docket No. 1986/1 (A.C.M.R. 11 March 1986) (unpub.) (Appendix), *pet. for review filed*, 21 M.J. 114 (C.M.A. 1986).

test and embark on an aggressive campaign to expand military jurisdiction beyond that intended by the Court and the Constitution.

The Court should reaffirm the service connection test as the constitutionally correct standard to be applied in determining military jurisdiction. A test balancing the constitutional rights of the individual soldier against the needs of the military properly reflects the intent of the framers of the constitution. Courts-martial do not accord an accused the same constitutional rights as Article III courts and, by their very nature, are subject to a degree of command influence that may rise to an unlawful level. The service connection test has not caused a decrease in military discipline, in fact, military recruitment and discipline have steadily increased over the last ten years. The lower court's additional factors of victim's rights and judicial economy do not justify a deviation from the service connection test and should not be considered when determining whether to deprive a serviceman of important constitutional rights.

### I. THE DECISION BELOW CANNOT BE SUSTAINED UPON FAITHFUL APPLICATION OF THE SERVICE CONNECTION TEST SET FORTH BY THE COURT IN *O'CALLAHAN V. PARKER*.

#### A. *The Military Judge's Determination That Appellant's Alaska Offenses Were Not Service Connected Was Faithful To The Court's Precedents.*

The decision of the court below cannot be reconciled with the Court's decision in *O'Callahan v. Parker*, 395 U.S. 258 (1969) [hereinafter cited as *O'Callahan*], which limited court-martial jurisdiction to those offenses that are "service-connected." While the Court acknowledged that specialized military courts were necessary, it concluded that, since these courts necessarily denied certain fundamental constitutional rights, they must be limited in scope to "the least possible power adequate to the end proposed." *Id.* at 265, quoting *Toth v. Quarles*, 350 U.S. 11, 23 (1955), quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat) 204, 231 (1821) (emphasis supplied by *Toth* Court). Writing for the Court in *O'Callahan*, Justice Douglas



extensively reviewed the history of court-martial jurisdiction and concluded that the historically restrictive approach toward military jurisdiction was not only appropriate but was constitutionally required because "[a] civilian trial . . . is held in an atmosphere conducive to the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice." *Id.* at 266.

The Court rejected the government's contention that the status of the accused alone was determinative<sup>4</sup> and held that the military did not have jurisdiction to try an Air Force sergeant for the rape of a girl in a civilian hotel. Several factors were identified by the Court in determining that O'Callahan's off-post offenses were not sufficiently service connected to constitutionally permit military prosecution:

In the present case petitioner was properly absent from his military base when he committed the crimes with which he is charged. There was no connection—not even the remotest one—between his military duties and the crimes in question. The crimes were not committed on a military post or enclave; nor was the person whom he attacked performing any duties relating to the military. Moreover, Hawaii, the situs of the crime, is not an armed camp under military control, as are some of our far flung outposts.

Finally we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits . . . the offenses did not involve any question of the flouting of military authority, the security of a military post, or the integrity of military property.

*O'Callahan*, 395 U.S. at 273-274 (footnote omitted).

<sup>4</sup> Prior to *O'Callahan*, the test for determining court-martial jurisdiction was assumed to be "one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval' forces." *Kinsella v. Singleton*, 361 U.S. 234, 240-241 (1960).

The Court, in a unanimous opinion, further developed the concept of service connection two years after it was first defined in *O'Callahan*. In *Relford v. Commandant*, 401 U.S. 355 (1971) [hereinafter cited to as *Relford*], the Court identified twelve factors set forth in *O'Callahan* to assess the existence of court-martial jurisdiction and amplified the concept of service connection by articulating nine additional factors. The Court noted that some of the factors applied to the facts in the *Relford* case operated against a finding of jurisdiction, but nevertheless held that military courts had jurisdiction to try an active duty soldier for rape and kidnapping offenses committed on an Army installation. The Court opined that "a serviceman's crime against the person of an individual upon the base or against property on the base is 'service connected' within the meaning of that requirement as specified in *O'Callahan*. . . ." *Id.* at 369.<sup>5</sup>

Application of the service connection analysis set forth in *O'Callahan* and *Relford* to the uncontroverted facts of this case leads inescapably to the conclusion that no measurable or direct service connection exists over the offenses alleged to have been committed by Solorio in Alaska. The military judge, after thoroughly analyzing the facts and conscientiously applying the criteria set forth in *O'Callahan* and *Relford*, properly concluded that Yeoman First Class Solorio's alleged Alaskan offenses were not service connected. See *United States v. Solorio*, 21 M.J. at 252-53. This determination was sound and faithful to the Court's precedents.

#### B. *The Lower Court's Holding Represents A Sub Rosa Attempt To Overrule O'Callahan.*

The Court of Military Appeals, while disagreeing with the military judge's conclusion, acknowledged that his ruling was

<sup>5</sup> The Court has declined to rule on the issue of whether court-martial jurisdiction existed over a sale of marijuana by an off duty soldier to an undercover military policeman. The Court rejected the defendant's argument that he would be prejudiced by pursuing his claim through the military courts. *Schlesinger v. Councilman*, 420 U.S. 738 (1975).



consistent with its own precedent.<sup>6</sup> *United States v. Solorio*, 21 M.J. at 254. The court justified its failure to adhere to the doctrine of *stare decisis* by observing that "some of our earlier opinions on service-connection should be reexamined in light of more recent conditions and experience." *Id.* at 254. The only recent development cited by the court to justify a radical departure from its precedents was the increased concern for victims of crimes, *Id.* at 254, a heightened concern far from unique to the military.<sup>7</sup> The court failed to explain how or why this development required a departure from over 15 years of precedent which had clearly delineated the scope of service connection.

Virtually the only *O'Callahan-Relford* factor relied upon by the court to sustain military jurisdiction was the "continuing effect" of the offenses on the victims and their families. This effect was, under the circumstances of this case, no different than the effect any sex crime typically has on any victim and his or her family. There was no showing that the alleged offenses harmed the reputation and honor of the Coast Guard or otherwise had a direct appreciable effect on the service. The service connection identified by the court below was simply too indirect and superficial to support a finding of court-martial jurisdiction based on the accepted traditional application of the service connection test.

The court below appeared to recognize the lack of service connection in this case based on a traditional analysis. The court ignored the explicit *O'Callahan-Relford* factors and cited the pendency of other military charges and the delay by

<sup>6</sup> Citing *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Henderson*, 18 C.M.A. 601, 40 C.M.R. 313 (1969). See also *United States v. Adams*, 13 M.J. 728 (A.C.M.R. 1982) (although military jurisdiction existed regarding on-post sex offenses, jurisdiction did not exist for off-post sex offenses involving same victim).

<sup>7</sup> Legal articles which discuss the nationwide trend of recognizing the rights of victims include Abrahamson, *Redefining Roles: The Victims Rights Movement*, 1985 Utah L.Rev. 517 (1985); Henderson, *The Wrongs of Victims and Witnesses: New Concerns in the Criminal Justice System*, 30 N.Y.L. Sch.L.Rev. 757-766(1985).

the civilian courts in prosecuting as additional factors supporting military jurisdiction. Nothing in *O'Callahan* or *Relford* suggests that these two considerations are relevant to the service connection inquiry.<sup>8</sup> The omission of these considerations from the service connection analysis is sound.

Any military interest in trying all alleged offenses at the same time does not, and should not, equate to a license to prosecute soldiers for offenses which are not otherwise sufficiently service connected.<sup>9</sup> Even the broadest reading of *O'Callahan* does not imply that the pendency of separate military charges was to be considered as a factor in finding service connection for other unrelated nonmilitary offenses.<sup>10</sup>

Similarly, the fact that a civilian jurisdiction has delayed or deferred prosecution does not rationally support the exercise of military jurisdiction over off-post, civilian-type offenses. One of the *O'Callahan* factors deals specifically with whether "[c]ivil Courts were open." *O'Callahan*, 395 U.S. at 273. The Court in *Relford* amplified this factor and looked to "[t]he presence and availability of a civilian court in which the case

<sup>8</sup> See *United States v. Shockley*, 40 CMR at 323, in which similar off-post charges were dismissed, even though other service-connected charges existed.

<sup>9</sup> The concept of pendent jurisdiction was developed to avoid unnecessary federal and state *civil* actions stemming from one common set of facts. *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966). Even if a theory of pendent jurisdiction can be applied to criminal cases, the case *sub judice* does not possess a nucleus of common facts. See *Independant Bankers Ass'n of New York State Inc. v. Marine Midland Bank, N.A.*, 757 F.2d 453 (2d Cir. 1985). Even assuming, *arguendo*, that the pendency of other charges is relevant to the service connection inquiry, the two sets of offenses in this case were so unrelated in time, place, and circumstances that any benefit to trying all offenses together is negligible and does not outweigh the infringement of petitioner's constitutional rights.

<sup>10</sup> In *United States v. Lockwood*, 15 M.J. 1, 7 (C.M.A. 1983), the Court of Military Appeals stated that, although the pendency of other military charges does not alone justify military jurisdiction over civilian offenses, it is a factor to be considered in determining service connection. The offenses in this case, however, do not all stem from a common nucleus of facts and therefore the pendency of military charges should not be a factor in determining jurisdiction over unrelated civilian offenses.

can be prosecuted." *Relford*, 401 U.S. at 365. The clear import of both discussions is that military jurisdiction is disfavored when the civilian courts have the capability to prosecute. This factor should not be construed to favor military jurisdiction merely because a local jurisdiction chose not to prosecute or "deferred" prosecution (and all the associated costs) to the military. The constitutional limits of military jurisdiction should not be allowed to fluctuate to accommodate the peculiar whims and changing interests of local jurisdictions. The court below recognized, but failed to fully appreciate, that military authorities will be able to manipulate this factor by obtaining letters of deferral from local prosecutors in a bootstrap effort to gain jurisdiction in areas where it did not formerly attach. *Solorio*, 21 M.J. at 256, 257. In an age of restricted fiscal resources it can be expected that many small jurisdictions will "defer" prosecutions and allow the military to bear the expense of trial.

The new factors cited by the court below are perhaps appealing from a cost-effectiveness standpoint. However, the decision to deprive soldier-citizens of their right to be tried in Article III courts should be based on factors more compelling than economics or convenience.<sup>11</sup> These two factors should not be considered pertinent to the service connection inquiry and the lower court's reliance on them reflects a fundamental misapplication of the teachings of *O'Callahan*.

C. *By Reversing The Lower Court's Holding The Court Will Define What Is Beyond The Boundaries Contemplated By O'Callahan.*

In the present case the Court of Military Appeals has transgressed the "outer limits" contemplated by *O'Callahan* and *Relford*. The Court in *O'Callahan* recognized that the limits of military jurisdiction could only be defined by a case-by-case application of the service connection factors. The Court surely anticipated that periodically it would be necessary to adjust or correct the lower court's definition of the outer

<sup>11</sup> See, e.g., *Bounds v. Smith*, 430 U.S. 817, 825 (1977) (Although economic factors may be considered, "[t]he cost of protecting a constitutional right cannot justify its total denial"); *Mitchell v. Cuomo*, 748 F.2d 804 (2d Cir. 1984) (Balance of state prison system's financial and administrative concerns and risk of substantial constitutional harm to inmates tipped decidedly in the inmates' favor).

boundaries of service connection. As Justice Blackmun stated in delivering the opinion of the Court in *Relford*:

O'Callahan marks an area, *perhaps not the limit*, for the concern of the civil courts and where the military may not enter. The case today marks an area, *perhaps not the limit*, where the court-martial is appropriate and permissible.

*Relford*, 401 U.S. at 369 (emphasis added). An analysis of the Court of Military Appeals' application of the service connection test indicates that the lower court has transgressed the constitutional boundaries of *O'Callahan*.

The lower court's early commitment to conscientiously apply the Court's guidance is reflected in the following observation:

What *Relford* makes clear is the need for a detailed, thorough analysis of the jurisdictional criteria enunciated to resolve the service-connection issue in all cases tried by court-martial. A more simplistic formula, while perhaps desirable, was not deemed constitutionally appropriate by the Supreme Court. It no longer is within our province to formulate such a test.

*United States v. Moore*, 1 M.J. 448, 450 (C.M.A. 1976). The court's detailed application of the jurisdictional criteria enunciated in *O'Callahan* and *Relford* led to determinations of a lack of jurisdiction in a significant number of military cases<sup>12</sup> involving a variety of off-post offenses including the use, sale and transfer of drugs,<sup>13</sup> sex offenses,<sup>14</sup> and property crimes.<sup>15</sup>

<sup>12</sup> See generally the cases cited in Annot., 14 A.L.R. Fed. 152, § 20 (1973). See also *Cole v. Laird*, 468 F.2d 829 (5th Cir. 1972).

<sup>13</sup> *United States v. Strangstalien*, 7 M.J. 225 (C.M.A. 1979); *United States v. Conn*, 6 M.J. 351 (C.M.A. 1979); *United States v. Klink*, 5 M.J. 404 (C.M.A. 1978); *United States v. Alef*, 3 M.J. 414 (C.M.A. 1977); *United States v. Williams*, 2 M.J. 81 (C.M.A. 1976); *United States v. McCarthy*, 2 M.J. 26 (C.M.A. 1976). These cases retracted the pre-*O'Callahan* view of the Court of Military Appeals that drug offenses were virtually *per se* service connected. See *United States v. Beeker*, 18 C.M.A. 563, 40 C.M.R. 275 (1969).

<sup>14</sup> *United States v. McGonigal*, 19 C.M.A. 94, 41 C.M.R. 94 (1969); *United States v. Shockley*, 18 C.M.A. 610, 40 C.M.R. 322 (1969); *United States v. Borys*, 18 C.M.A. 547, 40 C.M.R. 259 (1969).

<sup>15</sup> *United States v. Hopkins*, 4 M.J. 260 (C.M.A. 1978); *United States v. Sims*, 2 M.J. 109 (C.M.A. 1977); *United States v. Hedlund*, 2 M.J. 11



In 1980 the court re-examined the restrictive approach it had followed in drug cases and adopted a more expansive view that "[a]lmost every involvement of service personnel with the commerce in drugs is 'service connected.'" *United States v. Trottier*, 9 M.J. 337, 350 (C.M.A. 1980). While recognizing that it was departing from its established analysis of strictly applying the service connection criteria, it opined that a more flexible application of the concept "could be implied" from this Court's opinions. *Id.* at 345.

Three years later, the Court of Military Appeals held that a court-martial had jurisdiction to try a soldier for off-post larcenies committed by using a stolen military identification card. *United States v. Lockwood*, 15 M.J. 1 (C.M.A. 1983). Again admitting that this result was not consistent with its precedents, the court stated that it now attached "considerable importance" to circumstances previously considered insignificant. *Id.* at 10. Understandably perplexed, Judge Fletcher criticized the majority for reconsidering its prior decisions without adequately explaining why the earlier decisions were contrary to the law. Judge Fletcher stated: "The reasons advanced by the majority for jurisdiction resting in the military society seem to be related more to the question of organizational vanity rather than answering a strict question of law. . . ." *Id.* at 10-11. (Fletcher, J., dissenting).

The approach undertaken in the last few years by the highest military court to expand military jurisdiction creates a significant danger that trial and military review courts will abandon conscientious application of service connection criteria and adopt instead a *per se* service connection approach based on the nature of the offenses such as drug use and sex crimes against dependents.<sup>16</sup>

(C.M.A. 1976); *United States v. Uhlman*, 1 M.J. 419 (C.M.A. 1976); *United States v. Camacho*, 19 C.M.A. 11, 41 C.M.R. 11 (1969); *United States v. Crapo*, 18 C.M.A. 594, 40 C.M.R. 306 (1969); *United States v. Prather*, 18 C.M.A. 560, 40 C.M.R. 272 (1969).

<sup>16</sup> Some military courts of review have responded to the Court of Military Appeals' aggressive approach towards broadening military jurisdiction and rendered decisions that infringe upon the borders of service connection. *See*

The case *sub judice* marks the point where the lower court went beyond the boundaries of military jurisdiction. It is imperative that the Court strike the opinion below and provide clear guidance delineating the factors which the lower courts must consider and the outer limit which military courts cannot constitutionally breach.

## II. O'CALLAHAN V. PARKER WAS CORRECTLY DECIDED AND SHOULD NOT BE MODIFIED OR SET ASIDE.

### A. *The Court's Holding In O'Callahan Accurately Interprets the Intent Of The Constitution And Strikes An Appropriate Balance Between The Rights Of An Accused And Military Necessity.*

The Court in *O'Callahan* accurately interprets and harmonizes the provisions of the U.S. Constitution and the Bill of Rights which apply to the question presented. Article III, section 2, of the Constitution declares that "the trial of all crimes . . . shall be by jury: and such trial shall be held in the state where the said crimes shall have been committed." The fifth amendment to the Constitution explicitly excepts cases arising in the military from the requirements of grand jury indictment and trial by jury.<sup>17</sup> The service provision in the fifth amendment implies that a soldier's crime must be service connected in order to deprive him of his right to grand jury indictment and trial by jury. Thus, while Congress undoubtedly has power under Article I of the Constitution to make "rules for the Government and Regulation of the land and naval forces,"<sup>18</sup> this grant of authority must be interpreted in light

*e.g.*, *United States v. Griffin*, 21 M.J. 501 (A.F.C.M.R. 1985) (military jurisdiction for off-post rape of one soldier by another); *United States v. Householder*, 21 M.J. 613 (A.F.C.M.R. 1985) (military jurisdiction for off-post forgery of soldier's signature by another); *United States v. Roa*, 20 M.J. 867 (A.F.C.M.R. 1985) (military jurisdiction for off-post burglary of officer's home by soldiers who knew officer would be on duty and not at home); *United States v. Benedict*, 20 M.J. 939 (A.F.C.M.R. 1985) (military jurisdiction for indecent acts committed against minor dependent of soldier off-post by officer).

<sup>17</sup> Cases arising in the land and naval forces have also been judicially excepted by implication from the sixth amendment. *Ex parte Quirin*, 317 U.S. 1 (1942).

<sup>18</sup> U.S. Const., art I, § 8, cl. 14.



of the express guarantees and implied limitations contained in the Bill of Rights. The only conclusion which can be derived from interpreting the applicable provisions of the Constitution is that the Article I authorization and the fifth amendment exception were intended as limited concessions to military need and not to be used broadly to deprive defendants of the rights they enjoyed at civilian trials.

This limited application is consistent with the history and practice of trial by courts-martial in England and in this country before and at the time of the Revolution. Undoubtedly the framers considered the extent of court-martial jurisdiction under British rule when drafting the Constitution. Prior to the American Revolution, the English court-martial was an example of royal prerogative which was opposed by the parliament. The constant struggle for power between the crown and parliament kept the extent of English court-martial jurisdiction in check.<sup>19</sup>

At the time of the American Revolution, British law held that a soldier could not be tried by court-martial for a civilian offense committed in Britain.<sup>20</sup> When the colonists drafted their own Articles of War in 1775 and 1776, they used the British Articles as a guide and modified the Articles based on their own anti-crown and pro-parliament sentiments.<sup>21</sup> Sections IX and X of the American Articles of War particularly address the conflict between the need for military discipline and the ideal of justice administered by civilians.

Section IX was specifically concerned with disciplining soldiers while in the performance of their duties and allowed commanders to "see justice done." Articles of War 1776, Section IX, Article I. By comparison, Section X dealt with capital and serious crimes and required the commander to deliver, upon request, the accused soldier to a civil magistrate for prosecution. Articles of War 1776, Section X, Article I.

<sup>19</sup> F. Maitland, *The Constitutional History of England*, 326-27 (Fisher ed. 1908).

<sup>20</sup> 1 I. MacCauley, *History of England*, 231 (1874 ed.).

<sup>21</sup> Nelson and Westbrook, *Court-martial jurisdiction over servicemen for "civilian" offenses: An Analysis of O'Callahan v. Parker*, 54 Minn. L.Rev. 1, 12-14 (1970).

These sections establish a clear split of jurisdiction between disciplinary violations and serious common law crimes that directly affected the civilian community. They demonstrate a concern by the colonist for allowing the local civilian community to prosecute a crime committed therein and injuring its citizens and an equally important concern that serious crimes be prosecuted by courts according soldiers the same rights as ordinary citizens. Based on this practice, the leading authority on military law in the first century of this country, Colonel Winthrop, stated in his treatise that:

Where such crimes [as robbery, manslaughter and assault] are committed upon or against civilians not at or near a military camp or post, or in breach of a military duty or order, they are not in general to be regarded as within the description of the Article but are to be treated as civil rather than military offenses.

W. Winthrop, *Military Law and Precedents*, 724 (2d ed. 1896). Thus the framers of the Constitution implemented a court-martial system that was much more limited in scope than the comprehensive, expansive system extant today.

Between the Revolution and the Civil War, the military lacked clear statutory authorization to try soldiers for non-military offenses. In 1863 Congress enacted a statute establishing limited court-martial jurisdiction over certain offenses during time of war. Act of March 3, 1863, ch. 75 § 30, 12 Stat. 731. Thereafter, court-martial jurisdiction was expanded by Congressional enactments with judicial approval, an expansion which eventually led to a rule of status-based jurisdiction. *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866); *Kinsella v. Singleton*, 361 U.S. 234 (1960).

The Court's decisions in *O'Callahan* and *Relford* returned the limits of court-martial jurisdiction to that intended by the framers of the Constitution. The Court's recent decision in *Goldman v. Weinberger*, 475 U.S. \_\_\_\_ (1986), should not be construed as precedent for returning to pre-*O'Callahan* standards. In *Goldman* the Court deferred to military interests in promulgating and enforcing administrative regulations. The Court recognized the military's need for uniformity and consistently applied operational standards. In the case *sub judice*, however, the concept of deference is antithetical to

the constitutional definition of jurisdiction. The Court must define the boundaries of military jurisdiction as it was *intended* by the framers of the Constitution and not as it is *desired* by the military. Consequently the concept of deference to the military is not applicable in this context.

B. *Courts-Martial Deprive An Accused Of Numerous Rights And Privileges Guaranteed In Article III Courts And Therefore Should Only Be Convened To Preserve Important Military Needs.*

The Court's opinion in *O'Callahan* balances the importance of an accused's fifth amendment right to grand jury indictment and trial by jury against the legitimate needs of the military within the framework provided by our founding fathers. The service connection requirement of *O'Callahan* is necessary to ensure that this country does not break faith with its tradition of keeping military power subservient to civilian authority. As Justice Black observed in *Reid v. Covert*, 354 U.S. 1, 40 (1957), "this country has remained true to this idea [subservience of military power] for over one hundred and seventy years and even slight encroachments by military courts should not be tolerated."

One of the fundamental rights not afforded the military accused is the right to indictment by grand jury. Unlike the practice in Article III courts, serious charges in the military are investigated by a military officer who ultimately recommends disposition to the convening authority<sup>22</sup> Article 32, UCMJ. Although the procedure is likened to grand jury pro-

<sup>22</sup> The position of "convening authority" is unique to military law. The convening authority is a military commander and rarely, if ever, a judge advocate. He is charged by the UCMJ with judicial authority to create a court-martial. See Articles 22-24, UCMJ and Dep't of Army, Reg. No. 27-10, *Legal Services-Military Justice*, para. 5-2 (1 July 1984). Because a convening authority is always a commander, his responsibilities extend far beyond the administration of military justice. See Dep't of Army, Reg. No. 600-20, *Army Command-Policy and Procedures* (15 November 1980).

ceedings by some<sup>23</sup>, it is not an independent investigation and cannot be fairly equated with a grand jury. The investigating officer is appointed, usually by the special court-martial convening authority who is usually a commander subordinate to and in the chain of command of the general court-martial convening authority. The general court-martial convening authority is not bound by and can ignore the final recommendations of the investigating officer for any reason. Thus the convening authority can refer charges to a general court-martial even though the investigating officer, and the special court-martial convening authority that appointed him, recommended that the charges be dismissed.<sup>24</sup> Moreover, the commander can completely eliminate the requirement to conduct an Article 32 investigation merely by referring the charges to a special court-martial, which nevertheless has authority to administer severe punishment.<sup>25</sup>

Some critics of *O'Callahan* downgrade the significance of the denial of indictment by a grand jury. Invariably, these commentators point out that the Court did not consider this constitutional right fundamental enough to require states to adopt it through the fourteenth amendment. See *Hurtado v. California*, 110 U.S. 516 (1884). Nevertheless, the grand jury is a meaningful step in the judicial process.<sup>26</sup> This procedure is independent and can effectively screen prosecutions that are motivated by political, racial or other unacceptable reasons. Just as importantly, grand juries give consideration to and apply community notions of fairness and justice when

<sup>23</sup> See *Mercer v. Dillon*, 19 C.M.A. 264, 41 C.M.R. 264 (1970). See also Rice, *O'Callahan v. Parker: Court Martial Jurisdiction*, "Service Connection", *Confusion, and the Serviceman*, 51 Mil.L.Rev. 11 (Jan. 1971).

<sup>24</sup> *Manual for Courts Martial, United States, 1984*, Rule for Courts-Martial [hereinafter cited as R.C.M.] 405(a) and 407(a), discussion (Recommendations of investigating officer are advisory). Article 34, UCMJ, provides, however, that a commander must receive advice from his staff judge advocate that the specification is supported by evidence.

<sup>25</sup> A special court-martial is empowered to administer, *inter alia*, confinement for six months, a bad conduct discharge, forfeiture of two-thirds pay and reduction to the lowest enlisted rank. Article 19, UCMJ.

<sup>26</sup> Studies have shown that grand juries are not merely rubber stamps for prosecutors. See Wickersham, *The Grand Jury: Weapon Against Crime and Corruption*, 51 ABA.J. 1157 (1965).



reviewing charges. Lafave and Israel, *Criminal Procedure*, § 15.2 Grand Jury Review (1980). Far from being an independent investigator, an Article 32 investigating officer is answerable to his superiors for the performance of his duties and thereby subject to subtle military pressures. See generally *United States v. Remai*, 19 M.J. 229, 233 (C.M.A. 1985).

While there is disagreement over the relative importance of the right to grand jury indictment, few critics of *O'Callahan* have attempted to diminish the significance of the right to trial by jury. The composition of courts-martial is fundamentally different from the jury envisioned by the drafters of the sixth amendment. These differences and the shortcomings in the military system prompted Chief Judge Fletcher to make the following observation:

[C]ourt members, handpicked by the convening authority and of which only four of a required five ordinarily must vote to convict for a valid conviction to result, are a far cry from the jury scheme which the Supreme Court has found constitutionally mandated in criminal trials in both federal and state court systems.

*United States v. McCarthy*, 2 M.J. 26, 29 n.3 (C.M.A. 1976) (citation omitted). Service members are tried by military officers senior to the accused<sup>27</sup> who are detailed to the court by the convening authority based on their age, education, training, experience, length of service and judicial temperament. Article 25, UCMJ. Other than this broad guidance, there are virtually no constraints on a commander's discretion in appointing members.<sup>28</sup> Consequently, courts-martial rarely

<sup>27</sup> In a change enacted in the Military Justice Act of 1969, Pub. L. No. 90-632, 82 Stat. 1335 (1969), if the accused is enlisted and so requests in writing, the convening authority must detail enlisted members senior in rank to the accused to comprise at least one-third membership of the court. Article 25(c)2, UCMJ.

<sup>28</sup> In a recent case it was discovered that a staff judge advocate recommended to a convening authority that lower enlisted personnel and junior officers be excluded from court-martial panels. The Court of Military Appeals found this conduct inconsistent with Articles 25 and 37, UCMJ. *United States v. McClain*, 22 M.J. 124 (C.M.A. 1986).

represent a cross section of the military community and by definition are not composed of the accused's peers. The convening authority's discretion goes beyond appointing, for he can also authorize members to serve indefinitely or remove them without cause at any time before the court-martial is assembled. R.C.M. 505(c)(1)(A). Unlike civilian court practice, the accused in military courts is entitled to only one peremptory challenge. Article 41, UCMJ. See also R.C.M. 912(g)1.

To convict and sentence an accused the military prosecutor need only obtain the concurrence of two-thirds of the members sitting on a court martial. Article 52(a)2, UCMJ. The authorization of nonunanimous verdicts, coupled with the limited number of members required to compose a court martial,<sup>29</sup> clearly distinguishes the military system of justice from other criminal courts in this country and fails to meet the minimal requirements of the sixth amendment. See *Birch v. Louisiana*, 441 U.S. 130 (1979). See also *Ballew v. Georgia*, 435 U.S. 223 (1978) and *Williams v. Florida*, 399 U.S. 78 (1970). As Justice Black appropriately observed, "[t]he members of a court martial, in the nature of things do not and cannot have the independence of jurors. . . ." *Reid v. Covert*, 354 U.S. at 36.

The sole panacea for depriving the military accused of his constitutional right to trial by jury, one of the citizen's "most vital barriers to governmental arbitrariness," has been to limit court-martial jurisdiction to the minimum necessary.

<sup>29</sup> General courts-martial, which may render unlimited punishment, are required to consist of at least five members. R.C.M. 501(a)(1)(A). Special courts-martial, which are limited in the severity of punishment they can render, are required to have at least three members. R.C.M. 501(a)(2)(A). In either type of court-martial, a two-thirds majority is needed to support a finding of guilty, unless a guilty verdict dictates the death penalty in which case a unanimous verdict is required. R.C.M. 921(c)(3). Consequently, to render a federal conviction and a punitive discharge in a special court-martial, only two of the three "hand picked" members need agree to the accused's guilt. As a further example, a general court-martial may find a soldier guilty of murder under Article 118(1), UCMJ, which requires a minimum life sentence, with only four out of six members concurring in a finding of guilty.



See *Reid v. Covert*, 354 U.S. at 10 and *Middendorf v. Henry*, 425 U.S. 25 (1976). The court below failed to accord appropriate deference to the significance of this right which will be lost to countless servicemen as military jurisdiction expands over civilian crimes.

As the Court observed in *O'Callahan*, the presiding officer in a court-martial is not a judge whose "objectivity and independence are protected by tenure and undiminishable salary and nurtured by the judicial tradition." *O'Callahan*, 395 U.S. at 264. See also *Toth v. Quarles*, 350 U.S. at 17 and *Palmore v. United States*, 411 U.S. 389 (1973). Currently, military judges in the Army serve for limited periods of time<sup>30</sup> and do not have tenure.<sup>31</sup> Thus, military judges do not have the same opportunity to learn, gain experience and develop judicial temperament as do civilian judges.

The factor which perhaps most distinguishes the military justice system from civilian practice is the degree to which it is subject to the control of the commander. The commander exercises substantial control or influence over the entire court-martial process. Among other powers, the commander is responsible for selecting court members, Article 25, UCMJ, referring charges against the accused, R.C.M. 601(e), granting immunity to accomplices and witnesses, R.C.M. 704, bargaining with the accused over terms of pretrial agreements, R.C.M. 705, and approving the sentence adjudged, R.C.M. 1107.<sup>32</sup> The impartiality which these functions require is not always accorded the military accused.<sup>33</sup>

<sup>30</sup> According to Army personnel policy, military judges below the rank of Colonel will not be assigned to consecutive tours as military judges. *JAGC Personnel Policies*, Office of the Judge Advocate General, U.S. Army, October 1985, Para. 8-2(b).

<sup>31</sup> Fidell, *Judicial Tenure under the Uniform Code of Military Justice*, 31 Fed. B. News and J. 327 (1984).

<sup>32</sup> For a discussion of the substantial powers retained by the commander in the court-martial process, see Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 Mil.L. Rev. 43 (1977). See also Sherman, *Military Justice Without Military Control*, 82 Yale L.J. 1398 (1973).

<sup>33</sup> *United States v. Brice*, 19 M.J. 170 (C.M.A. 1985); *United States v. Miller*, 19 M.J. 159 (C.M.A. 1985); *United States v. Karlson*, 16 M.J. 469

Illegal command influence can deny an accused his constitutional right to a fair trial. See, e.g., *Homcy v. Resor*, 455 F.2d 1345 (D.C. Cir. 1971). However, despite this recognition and the continued efforts of Congress<sup>34</sup> to eradicate the problem, courts-martial have not been and will not likely ever be free from unlawful influence. The military justice system's demonstrated vulnerability to illegal command influence presents a significant danger to the military accused's ability to receive a fair trial. It is well established that unlawful command influence "may assume many forms, may be difficult to uncover, and affects court members in unsuspecting ways." *United States v. Karlson*, 16 M.J. at 474, citing H. Moyer, *Justice and the Military*, § 3-100-§ 3-400 (1972). The persistent and prevalent nature of unlawful command influence in the administration of military justice makes any fair comparison between trial in military and civilian courts impossible.

#### C. No Compelling Reasons Exist For The Court To Modify Or Overrule The Service Connection Test.

There have been no improvements in the military justice system which justify a modification of *O'Callahan* and

(C.M.A. 1983); *United States v. Rosser*, 6 M.J. 267 (C.M.A. 1979); *United States v. Johnson*, 14 C.M.A. 548, 34 C.M.R. 328 (1964); *United States v. Kitchens*, 12 C.M.A. 589, 31 C.M.R. 175 (1961); *United States v. Cruz*, 20 M.J. 873 (A.C.M.R. 1985), *pet. granted*, 22 M.J. 100 (C.M.A. 1986); *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984), *pet. granted*, 20 M.J. 131 (C.M.A. 1986); *United States v. Yslava*, 18 M.J. 670 (A.C.M.R. 1984), *pet. granted*, 19 M.J. 281 (C.M.A. 1985); *United States v. Rodriguez*, 16 M.J. 740 (A.F.C.M.R. 1983); *United States v. Toon*, 48 C.M.R. 139 (A.C.M.R. 1973).

<sup>34</sup> "Congress has clearly recognized that unlawful command influence on the members of a court-martial has a pernicious effect not only on Military Justice but on discipline and morale as well." *United States v. Karlson*, 16 M.J. 469, 474 (C.M.A. 1983) (citations omitted). Article 37, UCMJ specifically provides that "[n]o person subject to this chapter may attempt to coerce or, by any unauthorized means influence the action of a court-martial . . . in reaching the findings or sentence in any case." See also Article 98, UCMJ.

*Relford*.<sup>35</sup> Although the military justice system has improved since *O'Callahan* was decided, the system nevertheless does not and perhaps by its nature can not provide a judicial forum with the same constitutional degree of fairness as a trial in Article III courts. As the Court has so aptly stated, "military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the constitution has deemed essential to fair trials of civilians in federal courts." *Toth v. Quarles*, 350 U.S. at 17. It simply cannot be overlooked that the military courts are executive tribunals composed entirely of personnel who are in the executive chain of command. See *Reid v. Covert*, 354 U.S. at 36.

Many of the improvements in the military justice system were accomplished by the passage of the Military Justice Act of 1969.<sup>36</sup> These improvements did not rectify the constitutional deficiencies identified in *O'Callahan* and discussed *infra*. The military justice system continues to be used primarily as an instrument to preserve discipline, a purpose that will not likely change considering the military's important mission of protecting this country.

Some judges, legal scholars and military officials sharply criticized the *O'Callahan* decision because they feared the opinion would result in a breakdown in discipline and eventually lower the overall image and effectiveness of the military services. See *O'Callahan*, 395 U.S. at 274 (Harlan, J., dissenting). These fears, however, have proven groundless. Our military services are stronger today than when *O'Callahan* was decided. Casper W. Weinberger, Secretary

<sup>35</sup> The suggestion that improvements in the military justice system justify a modification of the service connection test was first advanced by Senator Sam Ervin in remarks to the Senate, 115 Cong. Rec. 17267 (1969). Several authors have called for reexamination of *O'Callahan*. See Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice*, 1969 Duke L. J. 853 (1969) and Nelson and Westbrook, *Court-Martial Jurisdiction over servicemen for civilian offenses: An analysis of O'Callahan v. Parker*, *supra*.

<sup>36</sup> Pub. L. No. 90-632, 82 Stat. 1335. Among other advances, this legislation gave military accused the right to be represented by qualified counsel, to request trial by military judge alone, the right of enlisted soldiers to request at least one third enlisted members and the right to all accused pending trial by special court-martial to be represented by qualified counsel.

of Defense, recently testified before the House Armed Services Committee that "[a]ll the services now are exceeding their recruiting goals . . . ." Department of Defense Authorization of Appropriations for Fiscal Year 1986: Hearings on H.R. 1872 Before the Committee on Armed Services, 99th Cong., 1st Sess. 13 (1985). General John W. Vessey Jr., Chairman of the Joint Chiefs of Staff, stated, "In contrast to about 10 years ago when 25 percent of the force was careerist, today about 50 percent of the force are careerist . . . ." *Id.* at 327. John O. Marsh, Jr., Secretary of Army, and General John A. Wickham, Jr., Chief of Staff of the Army, both testified that recruitment of high school graduates has steadily increased over the last six years while the four indices of indiscipline, i.e., unauthorized absence, desertion, violent crimes against persons and crimes against property, have all decreased in the last ten years. *Id.* at 419, 420, 431, 513.<sup>37</sup> Although the military success in recruitment and reducing indiscipline can not be directly attributable to *O'Callahan*, it clearly shows that application of the service connection analysis has not been harmful to the maintenance of military discipline.

The military services have a special interest in maintaining forces which are disciplined and which have respect for the law. This interest can be adequately met in most instances without unnecessarily abridging soldiers' constitutional rights by subjecting them to trial by courts-martial for civilian offenses. If, as a result of a proper application of the service connection test, a soldier is prosecuted in state or federal court, the military can exercise its broad powers to administratively separate the undesirable soldier.<sup>38</sup>

<sup>37</sup> In an article based on his congressional testimony on Feb. 27, 1986, before the House Armed Services Sub-committee on Military Personnel and Compensation, the Assistant Secretary of Defense (Force Management and Personnel) Chapman B. Cox states that, "[m]ajor deficiencies in the quality and quantity of the active component which prevailed in the late 1970's have been corrected in the last five years. We now have a well trained, well balanced, well motivated, well disciplined force." Cox C., *Manpower and the Total Force, Defense '86*, Soldier Magazine, p.24 (May-June 1986).

<sup>38</sup> See, e.g., Dep't of Army, Reg. No. 635-200, *Personnel Separations—Enlisted Personnel*, chapter 14, (1 October 1982). Other services have comparable discharge regulations.



Some critics of *O'Callahan* argued that it advanced an unworkable standard which would spawn uncertainty and confusion in defining the limits of court-martial jurisdiction.<sup>39</sup> These concerns proved to be unfounded as the Court of Military Appeals quickly developed the *O'Callahan-Relford* test into well-defined, workable standards. Unfortunately, the Court of Military Appeals' recent expansion beyond the limits of this established body of law has generated uncertainty and confusion surrounding military jurisdiction. This development is not, however, a product of *O'Callahan* and *Relford*. Rather, it stems from the willingness of military appellate courts to disregard precedent and chart a new course which does not follow the map furnished by the Court in *O'Callahan* and *Relford*.

While new developments in society may justify a reexamination of *O'Callahan*, the only "new development" cited by the court below was the increased concern for victim's rights. *Solorio*, 21 M.J. at 254. This is not the type of new development that triggers such a reexamination. The increased concern for victim's rights which the court below relied upon to reexamine its precedent is not a purely military phenomenon. Civilian courts are fully capable and willing to prosecute and punish military personnel who may commit civilian offenses. The military courts are in no better position to protect the rights of victims than state and federal courts and are in a far weaker position to protect the rights of the accused. In fact, it may be persuasively argued that the services lack the stable and hence experienced foundation existent in state-run victim assistance programs. Moreover, the interests the federal, state and military courts seek to vindicate remain substantially the same as they did when *O'Callahan* was decided.

### CONCLUSION

The decision in this case constitutes an unwarranted and unconstitutional extension of court-martial jurisdiction which transcends the limits set forth by the Court in *O'Callahan* and

<sup>39</sup> See Everett, *O'Callahan v. Parker—Milestone or Millstone in Military Justice*, *supra*.

*Relford*. Petitioner's Alaskan offenses are not sufficiently service connected to meet the *O'Callahan-Relford* guidelines and, accordingly, the exercise of military jurisdiction in this case was constitutionally improper.

The Court's decision in *O'Callahan* strikes an appropriate balance between the competing interest of the military and the rights of American citizens in uniform. The military justice system is considerably different from the civilian court system and does not provide certain fundamental constitutional rights to the accused. The *O'Callahan* decision correctly interprets the Constitution, rests on sound policy and rationale and sets forth a workable, realistic foundation for determining the appropriate sphere of military jurisdiction. There exists no sound or compelling reason to modify the standards set forth seventeen years ago. Indeed, the Court should take this opportunity to reaffirm the continued vitality of *O'Callahan* and the principle that soldiers will be afforded their constitutional right to accusation and trial by civilian courts for offenses which are not service connected.

Accordingly the lower court should be reversed and the Alaskan charges dismissed.



Respectfully submitted,

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APPENDIX

UNITED STATES ARMY COURT  
OF MILITARY REVIEW

Miscellaneous Docket No. 1986/1  
U.S. Army Aviation Center and Fort Rucker  
S.L. Trail, Military Judge

UNITED STATES, APPELLANT

v.

STAFF SERGEANT RANDY W. J. ABELL, 516-72-8041,  
UNITED STATES ARMY, APPELLEE

11 March 1986

Before YAWN, WILLIAMS, and KENNETT, Appellate  
Military Judges

For Appellant: Colonel James Kucera, JAGC, Lieutenant  
Colonel Adrian J. Gravelle, JAGC, Lieutenant Colonel  
Joseph A. Rehyansky, JAGC (on brief).

For Appellee: Colonel Brooks B. La Grua, JAGC, Lieu-  
tenant Colonel William P. Heaston, JAGC, Major Eric T.  
Franzen, JAGC, Captain David W. Sorensen, JAGC (on  
brief).

MEMORANDUM OPINION

Per Curiam:

Pursuant to Article 62, Uniform Code of Military Justice  
(UCMJ), 10 U.S.C. § 862 (Supp. I 1983), and in accordance  
with Rule for Courts-Martial 908, Manual for Courts-Martial,  
United States, 1984, the government appeals the trial judge's  
ruling that the military lacks subject matter jurisdiction over  
the offenses alleged in the case.

(1a)

2a

Appellee was arraigned at a general court-martial at Fort  
Rucker, Alabama, on three specifications alleging indecent  
acts with children under the age of 16 years, violations of Ar-  
ticle 134, UCMJ. The facts show, *inter alia*, the alleged of-  
fenses occurred in appellee's trailer at a trailer court in  
Daleville, Alabama. The trailer court is located adjacent to  
Fort Rucker, separated from the installation by a railroad  
track, but six to eight miles from the main cantonment. Each  
of the alleged victims were dependents of soldiers and re-  
sided in the same trailer court as did the accused. Approx-  
imately 80 percent of the residents of this trailer court con-  
sisted of soldiers and their dependents. No evidence was pre-  
sented, however, showing any contact or activity between  
the appellee and the alleged victims or their military fathers  
occurring on Fort Rucker.

Having reviewed the record and carefully considered briefs  
filed by both the government and the appellee, we conclude  
that the offenses alleged are "service connected" and that the  
military judge erred by dismissing them for lack of subject  
matter jurisdiction. *United States v. Solorio*, 21 M.J. 251  
(CMA 1986).

The appeal of the United States pursuant to Article 62,  
UCMJ, is granted. Accordingly, the ruling of the military  
judge dismissing the charge and specifications is vacated, and  
the record will be returned to the military judge for action not  
inconsistent with this opinion.

For the Court:

/s/ WILLIAM S. FULTON, JR.  
William S. Fulton, Jr.  
Clerk of Court

JUL 81 1985

JOSEPH F. SPANIOL, JR.  
CLERK

IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1985

RICHARD SOLORIO,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF MILITARY APPEALS

**BRIEF *AMICUS CURIAE* FOR THE  
VIETNAM VETERANS OF AMERICA  
IN SUPPORT OF PETITIONER**

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No. 85-1581

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IN THE  
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RICHARD SOLORIO,

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF MILITARY APPEALS

---

BRIEF AMICUS CURIAE FOR THE  
VIETNAM VETERANS OF AMERICA  
IN SUPPORT OF PETITIONER

---

Interest of the Amicus <sup>1</sup>

Vietnam Veterans of America ("VVA") is the largest national organization devoted exclusively to representing the needs and interests of veterans who served in the United States armed forces during the Vietnam era. It submits this brief amicus curiae in support of petitioner, to urge reversal of the decision of the Court of Military Appeals that drastically expanded the subject-matter jurisdiction of military courts beyond what is permitted by clear-cut precedents of this Court.

VVA's over 30,000 members, in 245 chapters throughout the United States, all served on active duty during the Vietnam

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<sup>1</sup> Letters from counsel for petitioner and respondent consenting to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 36.2.

era. Many of them remain in the armed forces today, either on active duty or on disability or other retirement. All have been subject to the provisions of the Uniform Code of Military Justice ("UCMJ").

VVA was founded to improve the physical, legal, social and economic well-being of Vietnam veterans. It has long promoted legal efforts to assist veterans to obtain job training, health care and disability benefits.

In addition to representing veterans before the Board of Veterans Appeals, military Discharge Review Boards and the boards for the Correction of Military Records, VVA has participated in litigation to assist veterans on many issues. It has been particularly active in the recently-settled litigation over the toxic defoliant Agent Orange. It recently appeared as amicus

curiae in this Court in Attorney General of the State of New York v. Soto-Lopez, dkt. no. 84-1803, -- U.S. --/, 54 U.S.L.W. 4661 (June 17, 1986) and Walters v. National Association of Radiation Survivors, -- U.S. --, 105 S. Ct. 3180 (1985). It has also appeared as amicus curiae in the United States Court of Military Appeals, most recently in United States v. Yslava, dkt. no. 50,410/AR, -- M.J. -- (sub judice), a case involving the exercise of unlawful command influence over courts-martial.

Because this case involves the possible extension of the military justice system to cases that the Court of Military Appeals has heretofore held were not service-connected, VVA has a strong interest in participating. Many of VVA's members have first-hand experience of the military justice

system, as court members, counsel or defendants.

VVA believes that this Court was correct when it recognized in O'Callahan, and reaffirmed in Relford, that the justification for a system of specialized military criminal courts, independent of Article III of the Constitution and proceeding by practices different from those in civilian courts, and "in general less favorable to defendants . . .," O'Callahan v. Parker, 395 U.S. 258, 265 (1969) "rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty." Id., 395 U.S. at 265. VVA therefore believes that the decision below expanding jurisdiction of these specialized courts to an area beyond those special needs should be reversed.



### Summary of Argument

This Court has long recognized that a separate system of military criminal courts rests upon the need for swift maintenance of discipline, for expertise in adjudicating peculiarly military crimes, and for jurisdiction where civilian courts are unavailable. At the same time, this Court has emphasized that courts-martial traditionally provide a "rough form of justice," Reid v. Covert, 354 U.S. 1, 35 (1957), often to the detriment of the accused, and are generally unqualified to deal with subtle questions of Constitutional law. The procedural and substantive shortcuts in military trials range from the commanding officer's discretion in selecting

the Court's personnel, through the limited avenues of appeal available to a defendant.

Recognizing these shortcomings, this Court has limited court-martial jurisdiction to those cases that involve the interests the military justice system was created to serve. This case involves none of those interests. It does not involve a peculiarly military-type crime. It does not pose a threat to the security of any military base. It did not require -- and did not receive -- swift adjudication in the military system. It involves none of the special considerations that historically justify the assertion of military jurisdiction and the consequent abridgement of a defendant's rights. The fortuity that a victim is the child of a service-member cannot provide the ground for subject-matter jurisdiction, and there is no reason to believe that

trial by court-martial serves the interests of protecting victims.

The decision below vastly increases the class of offenses that may be tried by military courts. In doing so, it puts the military into potential conflict with state authorities, without in any way benefitting victims. It provides no logical and coherent standards for military courts to resolve the constitutional issue of service-connection. The standards it does propose would permit military courts to arrogate to themselves the power to try crimes they deem to reflect adversely upon the military. It would abandon the clear, unanimous guidelines of Relford v. Commandant, 401 U.S. 355 (1971), and, ironically, revive the criticism that O'Callahan provided insufficient guidance for military courts.

For these reasons, the order of the trial judge, dismissing the Alaska offenses for lack of subject matter jurisdiction, was correct, and the decision of the Court of Military Appeals should be reversed.

#### Statement of Facts

For purposes of constitutional analysis, the relevant facts are easily identifiable and are not in dispute. Analyzed in accordance with the factors identified unanimously in Relford, they are:

1. The defendant was properly away from his duty station.
2. The offense occurred in a private home in the civilian community, eleven miles from any military facility.
3. The offense occurred in peacetime, within the territorial limits of the United States.
4. The offense bore no relation to the defendant's military duties.

5. The victims were not in the service, and were not engaged in the performance of any military duties at any time.
6. The civilian courts had jurisdiction over the offense, were fully functioning, and had tried other servicemen for the same offenses.
7. There was no relation between the offense and any military property.
8. There was no threat to the security of any military base -- indeed, there was no base to threaten.
9. The offenses were discovered months after the defendant and the victims left Alaska.

A general court-martial was convened on Governors Island, New York, three thousand miles from the vicinage of the offenses at issue. On defendant's motion to dismiss the Alaska charges for lack of subject-matter jurisdiction, the Military Judge, an experienced officer with years of operational service, including command of

a ship in Vietnam, did precisely what a reading of O'Callahan and Relford required him to do -- he analyzed the case in terms of the factors clearly identified by this Court. Doing so, he concluded that "what little if any distinct military interest there may be can be adequately vindicated in civilian courts." Pet. App. 61a.

The court below acknowledged that "A military judge's factfinding power under Article 62 cannot be superseded by a Court of Military Review," 21 M.J. at 254. Nevertheless, responding to the prosecution's plea to adopt a more "flexible" standard than that of O'Callahan and Relford, it reversed the Military Judge. In a dramatic and acknowledged about-face from their court's own precedents<sup>2</sup>, the two judges

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<sup>2</sup> "Admittedly, our precedents involving off-base sex offenses against civilian dependents of military personnel would



constituting the Court of Military Appeals chose to depart from the Relford criteria, and returned the case for trial by court-martial, at which Petty Officer Solorio was convicted of the charges at issue.

#### Argument

##### I

#### THE MILITARY JUSTICE SYSTEM RESTS ON THE SPECIAL NEEDS OF THE MILITARY AND MILITARY TRIALS ARE RESTRICTED TO JURISDICTION RELATED TO THOSE NEEDS

It is not disputed that maintaining a separate system of criminal courts for the military serves a valuable, but limited, purpose.

That a system of specialized military courts, proceeding by practices different from those obtaining in the regular courts

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point to a different conclusion." 21 M.J. at 254.

and in general less favorable to defendants, is necessary to an effective national defense establishment, few would deny. But the justification for such a system rests on the special needs of the military, and history teaches that expansion of military discipline beyond its proper domain carries with it a threat to liberty. This Court, mindful of the genuine need for special military courts, has recognized their propriety in their appropriate sphere, e.g., *Burns v. Wilson*, 346 US 137, 97 L Ed 1508, 73 S Ct 1045, but in examining the reach of their jurisdiction, it has recognized that

"There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.  
. . .

"Determining the scope of the constitutional power of Congress to authorize trial by court-martial presents another instance calling for limitation to 'the least possible power adequate to the end proposed.'" *Toth v. Quarles*, 350 US 11, 22-23, 100 L

Ed 8, 17, 76 S Ct 1 [quoting Anderson v. Dunn, 6 Wheat. (19 U.S.) 204, 230-31 (1821)].

O'Callahan v. Parker, 395 U.S. at 265 (emphasis in original).

Courts and experienced commentators have traditionally identified three grounds for maintaining a separate system of courts for criminal cases in the military: necessity, expertise and discipline. See R. Everett [now Chief Judge of the Court of Military Appeals, and author of the opinion below], Military Justice in the Armed Forces of the United States 4-7 (1956), quoted in H. Moyer, Justice and the Military (1972) at 13.<sup>3</sup>

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<sup>3</sup> Military authorities agree: "Unless military justice is oriented to a military task of instilling discipline within a military command, then military justice has no reason for being." [Brig. Gen.] D. Faw, "Why Military Justice?" 45 Off the Record (published by the Office of the Navy Judge Advocate General) (encl. 7)

A respected authority concludes:

The basic reasons for the existence of a separate system of military justice may be summarized as (1) the need for swift and summary machinery for the maintenance of discipline; (2) the fact that the adjudication of military crimes may require military expertise by the court; and (3) the fact that the armed forces may be stationed abroad, outside the jurisdiction of their country's civil courts.

J. Bishop, "Military Law," 10 Int'l Ency. of the Social Sciences 312 (1968).

This Court, too, has concluded that "Traditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining

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(1970), quoted in Moyer, op. cit. at 15. "Naval justice must always be administered with its primary purpose in view -- the efficient functioning of the Navy." Naval Justice, NAVPERS 16199 (1945), quoted in Moyer, op. cit. at 18.

obedience and fighting fitness in the ranks." Reid v. Covert, 354 U.S. 1, 36-37 (1957).

Understood in this light, courts-martial serve valid purposes in adjudicating cases peculiar to the military, such as unauthorized absence, desertion, disrespect to superiors and disobedience of orders. In addition, where there is a need for summary maintenance of discipline; or where resources are limited, as in combat zones or where lawyers are unavailable; or where civilian tribunals are without jurisdiction; or where the security of a base is threatened, it is justifiable to forego the procedures that have evolved in civilian courts into standards of due process of law.

While these reasons justify the existence of courts-martial, "[M]ilitary tribunals have not been and probably never can be constituted in such a way that they

can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts." Toth v. Quarles, 350 U.S. 11, 17 (1955)<sup>4</sup>. "[C]ourts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law." O'Callahan v. Parker, 395 U.S. at 265. The system designed for the special purposes of military justice consistently comes up short when judged by customary standards of substantive and procedural fairness.

These weaknesses and short-cuts pervade the system, ranging from the unavailability of bail and the absence of a right to trial in the vicinage, through the commanding

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<sup>4</sup> Lest the Court believe that developments since Toth affect its vitality, it should note that the two defects of courts-martial emphasized in Toth -- lack of judicial tenure, and trial by hand-picked court members -- remain unchanged since then.



officer's discretion in hand-picking court personnel, to the limited avenues of appeal available to a defendant. While this is not the place for a detailed analysis of the Uniform Code of Military Justice, some salient examples are revealing:

Personnel: Participants in a court-martial are selected by the convening authority, who is usually also the officer who decided to bring charges in the first instance.

The military judge picked to preside enjoys absolutely no term of office. He may be removed at the conclusion of the trial, or re-appointed to serve again.<sup>5</sup>

Court members, the military equivalent of jurors, are hand-picked by the convening

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<sup>5</sup> See Toth v. Quarles, 350 U.S. 11 (1955); Fidell, "Judicial Tenure Under the Uniform Code of Military Justice," 31 Fed. Bar News & J. 327 (1984).

authority on a case-by-case basis -- a system that has been analogized to having the jury picked by the sheriff's office. Parisi v. Davidson, 405 U.S. 34, 53 n.5 (1972) (citing testimony at House of Representatives hearings on the Uniform Code of Military Justice) (Douglas, J., concurring).

Courts as small as three hand-picked members are authorized for special courts-martial, and as small as five for general courts-martial. Their verdicts need not be unanimous except to sentence a service-member to death.

Trial by peers is not possible, because enlisted personnel -- the vast majority of those tried by court-martial -- can request only that one-third of the Court consist of enlisted personnel, and even those must

be senior in rank to the defendant.<sup>6</sup> Moreover, as the Justice Department has recognized (in arguing to uphold the death penalty under the UCMJ), court members customarily serve at other times in prosecutorial roles in which they are themselves responsible for enforcing discipline<sup>7</sup>.

**Counsel** in special courts-martial are also hand-picked, and are, like court members, subject to their commanding officers' powers of persuasion and leadership, including the prerogatives of assigning duties, issuing or withholding promotion, or recom-

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<sup>6</sup> Article 25, UCMJ, 10 U.S.C. §825.

<sup>7</sup> "Military officers not only sit regularly as members of courts-martial; they act as convening authorities, summary courts-martial and investigating officers and, when in command, they impose non-judicial punishment." In other words, they are experienced as prosecutors. Brief of the United States Department of Justice, as amicus curiae on behalf of the United States Army in United States v. Matthews, 16 M.J. 354 (C.M.A. 1983), at 25.

mending transfer or separation from the service. Where lawyers are unavailable, a special court-martial may proceed without them.<sup>8</sup>

**Venue:** A service-member does not enjoy the Sixth Amendment right to trial in the State and district in which the crime is committed.

**Notice of Charges:** A service-member may be tried by special court-martial on three days' notice, and by general court-martial on five days' notice.<sup>9</sup>

**Punishment:** Courts-martial are no mere misdemeanor courts. The UCMJ authorizes a sentence of death for well over a dozen

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<sup>8</sup> Article 27(c), UCMJ, 10 U.S.C. §827(c). While the most blatant examples of retaliation are prohibited by Article 37, UCMJ, 10 U.S.C. §837, there has been no change in the statute since the pervasiveness of command influence was noted in O'Callahan, 395 U.S. at 264-65.

<sup>9</sup> Article 35, UCMJ, 10 U.S.C. §835.

offenses, including such uncommon crimes as improper use of a countersign<sup>10</sup> and forcing a safeguard.<sup>11</sup> Some, like murder and rape, have no special military content.<sup>12</sup>

Several forms of less severe punishment, including fatigue duties for 45 days, and confinement on bread and water, are autho-

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<sup>10</sup> Article 100, UCMJ, 10 U.S.C. §900.

<sup>11</sup> Article 102, UCMJ, 10 U.S.C. §912. See also articles 82 (solicitation), 85 and 88 (desertion, assault or disobedience in time of war), 94 (failure to suppress or report, a mutiny), 99 (cowardly conduct), 110 (willfully hazarding a vessel), and 113 (misbehavior of sentinel in time of war).

<sup>12</sup> The death-penalty procedures of the UCMJ were overturned by the Court of Military Appeals in 1983. United States v. Matthews, 16 M.J. 354. The President has since attempted to remedy these procedural defects by executive order. Rules for Courts-Martial 1104, Manual for Courts-Martial (1984). No court since Furman v. Georgia has had occasion to rule on the Constitutionality of the UCMJ's death penalties for offenses other than murder, though the Court of Military Appeals in Matthews declined to apply Coker v. Georgia, 433 U.S. 584 (1977), to invalidate the military's death penalty for rape.

rized by the UCMJ without trial and without affording the accused the assistance of counsel.

Appeals: The defendant may not appeal to any court a conviction resulting in a sentence less severe than confinement at hard labor for one year, or a punitive discharge.<sup>13</sup> As a result, the majority of court-martial convictions are not subject to direct review in any court of law.<sup>14</sup>

The prosecution, on the other hand, may take interlocutory appeals even from evidentiary rulings, and such appeals have priority over all other proceedings in the Courts of Military Review.<sup>15</sup>

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<sup>13</sup> Article 66, UCMJ, 10 U.S.C. §866.

<sup>14</sup> See Fidell, "Military Rights of Appeal," 8 Dist. Law. #6, 42 (Jul. - Aug., 1984).

<sup>15</sup> Article 62, UCMJ, 10 U.S.C. §862.



There is thus more at stake in the issue of service connection than the mere choice of a convenient forum. Military courts exist for legitimate, but special, purposes. This Court has consistently recognized as much, whether upholding court-martial authority as in Parker v. Levy and Relford v. Commandant, or restricting it as in Toth v. Quarles and O'Callahan v. Parker. Any analysis of subject matter jurisdiction must begin with those purposes in mind, and must determine whether those purposes justify the limitations on defendants' rights and the departure from traditional concepts of fairness and justice inherent in trial by a military court. Because no such special interests are served in this case, as we now show, the decision of the Court below should be reversed.

## II

THIS CASE DOES NOT AFFECT  
THE SPECIAL NEEDS OF THE MILITARY

Because "Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and more importantly, acts as a deprivation of the right to jury trial and of other treasured constitutional protections," Reid v. Covert, 354 U.S. 1, 21 (1957), this Court has consistently resisted attempts to expand the jurisdiction of courts-martial, and has limited the powers of military tribunals to "the least power adequate to the end proposed." Toth v. Quarles, 350 U.S. 11, 23 (1955).

On the facts of this case, there can be little doubt that the Court of Military Appeals' decision to extend court-martial jurisdiction is an aberration.

It is helpful for this analysis to recall clearly what this case is not. It is not a case arising in time of war, or in a combat zone. It does not arise overseas. It does not involve a military crime with no civilian counterpart. It is not a case that civilian courts are powerless to prosecute. It poses no threat to the security of any military base. Because the facts were not discovered until long after all the parties were transferred, it did not affect the morale or discipline of a military office, or even its reputation in the civilian community. It does not involve a victim performing a military duty. It bears no relation to any military property. It does not require any military expertise. In short, it involves no special military consideration of the type that historically justifies the assertion of military juris-

diction and its concomitant lessening of the defendant's rights and protections.

In response to these undisputed facts, the Court of Military Appeals relied upon a single fortuity: that the fathers of the victims were servicemen. But, while that Court properly noted the identity of the victims, it mistook the legal significance of that factor under O'Callahan and Relford.

Of the factors identified by this Court as significant to a determination of service-connection, only one concerns the identity of the victim, and that relates not to who the victim was, but to what he or she was doing. What is significant is not whether the victim was in the service, but whether the victim was engaged in the performance of a military duty. Relford v. Commandant, 401 U.S. at 365. That distinction is crucial, and is entirely con-

sistent with the other Relford factors. Like them, it is designed to distinguish those crimes that interfere with a military mission or military security from those that do not. Only the former may be service-connected.

Until this case, the Court of Military Appeals itself recognized and adhered to this distinction, holding that service-connection could not rest solely on the victim's status as a military dependent. United States v. McGonigal, 19 U.S.C.M.A. 94, 41 C.M.R. 94 (1969); United States v. Shockley, 18 U.S.C.M.A. 610, 40 C.M.R. 322 (1969); United States v. Henderson, 18 U.S.C.M.A. 601, 40 C.M.R. 313 (1969). See Fleiner v. Koch, 19 U.S.C.M.A. 630 (1969).

Thus, under clear guidelines from both this Court and the Court of Military Appeals, there could be no finding of

service-connection based solely on a victim's status as a service-member. Even if a service-member were engaged in the performance of a military duty at the time of a crime, that would satisfy only one of the Relford factors, and would be only the beginning of the inquiry, not the end.

Here, the weight of the various Relford factors is not in issue, and no balancing of those factors is required. The victims were not service-members. There can be no conceivable claim that they were engaged in any military mission, or that the offenses interfered with their military duties. The military judge, understanding and applying the unanimous standards of this Court in Relford, recognized as much. Only by misconstruing one of the Relford factors, and then elevating its importance over all the other criteria established by this Court,



could the Court of Military Appeals reverse its own precedents and find sufficient service-connection to subject Petty Officer Solorio to trial by a military court.

It is no answer to say, as the Court below said, that society in recent years has shown increasing solicitude for victims of crime. That development is not peculiar to the military, and there is absolutely no reason to believe that military courts will protect victims better than will civilian courts.

Moreover, military courts, which have no civil jurisdiction<sup>16</sup> and no experience

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<sup>16</sup> "The jurisdiction of courts-martial is entirely penal or disciplinary." Rule 201, Manual for Courts-Martial (1984). The "Discussion" under this rule provides: "A court-martial has no power to adjudge civil remedies. For example, a court-martial may not adjudge the payment of damages, collect private debts, order the return of property, or order a criminal forfeiture of seized property."

in domestic relations matters -- which remain the responsibility of the appropriate civilian courts -- may be singularly inept to accommodate the needs of juvenile victims of crime. They have no experience with juveniles. They have no probation or social service arm. They have a limited range of available punishments. With no provisions for compelling restitution, awarding damages or requiring community service, or for imposing or supervising probation, they are without the tools becoming increasingly familiar in civilian victim protection programs. Sentencing a defendant to confinement at hard labor or on bread and water, while perhaps satisfying in a sense of arcane retribution, may provide little tangible support for a victim.

In sum, this case involves none of the facts that Relford identified as supporting

service-connection, and none of the traditional grounds for exercising court-martial jurisdiction. There is neither need nor power to try cases like it in military courts.

### III

#### THE DECISION BELOW RAISES PROBLEMS OF FEDERALISM AND PROVIDES NO LOGICAL AND VALID STANDARDS FOR DETERMINING SUBJECT-MATTER JURISDICTION

The Court of Military Appeals denies it is "trying to rewrite the Supreme Court's opinion in O'Callahan," 21 M.J. at 254,<sup>17</sup> saying instead it was applying that case to "conditions as they now exist." Id. The foundations on which O'Callahan and Relford rest, however, have not changed

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<sup>17</sup> Cf., R. Everett, "O'Callahan v. Parker - Milestone or Millstone in Military Justice?" 1969 Duke L.J. 853, 896 (1969), where the author wrote, "[I]t can be readily perceived that this writer does not agree with the approach of the majority in O'Callahan v. Parker."

since they were written. Military courts still derive their authority from the Congressional power to "make rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, §8, cl. 14. The substantive and procedural short-cuts of courts-martial, noted by this Court since at least Toth v. Quarles, and the concept of civilian primacy, which reaches back to the foundation of the Republic, see Ex Parte Milligan, 4 Wall. (71 U.S.) 2 (1870), remain unchanged. The preference for resolution of judicial issues by Article III courts has, if anything, increased. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).<sup>18</sup>

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<sup>18</sup> Discussing court-martial jurisdiction, the Court there noted, "[T]his Court has been alert to ensure that Congress does not exceed the Constitutional bounds and bring within the jurisdiction of the

The only "new item" to which the Court below can point is the "increase in the concern for victims of crime." We have already discussed, in Point II, why there is no reason to believe that military courts are peculiarly sensitive to the concerns of victims, or are better equipped to accommodate their needs. Indeed, to the extent there exists in the civilian community a perception that the military will "take care of its own," bringing civilian victims into a military forum for a case to be tried by military rules may hardly demonstrate fairness to the victim.

For the moment, however, we examine the consequences of the Court of Military Appeals' new approach resting on the status of the victim. What is the rule of the

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military courts matters beyond that jurisdiction, and properly within the realm of 'judicial power.'" 458 U.S. at 66, n.17.

decision below, and what does it mean for this country's system of criminal justice?

To begin with, by sweeping millions of dependents into an Article I court system, the decision vastly increases the class of victims, offenses against whom could give rise to trial by court-martial. Moreover, it takes those cases, not out of the federal judicial branch, but from the states, raising troubling problems of federalism. By increasing the jurisdiction of courts-martial over off-base civilian-type offenses, the decision below puts the military into potential conflict with state civilian authorities, who might understandably expect to have jurisdiction to try civilian-type crimes in their own communities. Where the courts that routinely try such cases are open and available, how is the proper forum to be selected?



To be sure, a service-member could be tried by both the military and state civilian courts without offending the letter of the double jeopardy clause, but that hardly seems a desirable solution, and it would not satisfy the concern for minimizing the burdens on victims expressed by the Court below.

To avoid that problem, the military and the fifty states could negotiate concordats similar to the Status of Forces Agreements the United States enters with foreign countries, spelling out which offenses will be tried by which courts. One may question the desirability of requiring the states to negotiate such treaties, which would no doubt leave the subject-matter jurisdiction of courts-martial a crazy quilt varying from state to state.

The approach of the Court below has

little to recommend it in the way of logic, consistency, or certainty of outcome. A purely victim-based military jurisdiction would run afoul of established Constitutional principles. The same crimes, committed in the same places, against the same victims, do not "aris[e] in the land or naval forces" if committed by civilians or dependents, over whom there is no subject-matter jurisdiction even if the crimes were committed overseas in a place where civilian courts were not functioning. Toth v. Quarles, 350 U.S. 11 (1955), Reid v. Covert, 354 U.S. 1 (1957).

To avoid the teaching of those cases, the Government argued below, and in its opposition to the petition for certiorari, that this case fell within the traditional grounds for court-martial jurisdiction because the crime threatened the security

of a military base. Explaining how this could possibly be when there was no base to threaten, the Government argued that, "because there is no military base in Alaska for Coast Guard personnel or their families...." "...it is reasonable to treat offenses committed against Coast Guard servicemen and their dependents in Juneau as if they were committed on a military base." Op. at 13. The Government argues further that, because there is no base, it is "immaterial" where the offenses occurred. Id. We confess our inability to respond to this argument that jurisdiction rests on the threat to base security because there is no base.

A final rationale offered by the Court below is the elusive standard of "impact" on the emotions or morale of the military community caused by disgust for or

disapproval of a defendant's acts. Such a standard could apply equally to virtually any conduct of a service-member, and it is far too vague a test for determining criminal jurisdiction. Locigally, it could extend court-martial jurisdiction over off-base civilian-type offenses against relatives, friends and neighbors of service-members, as well as over any offense against anyone, committed anywhere, that received sufficient publicity to direct adverse attention to the military. There is no justification for such a rule that anything that, in its own view, reflects adversely on the military, can be tried by a military tribunal -- at least not in this democracy.


We are left, then, without a satisfactory rule in the decision below. What remains -- if the opinion is to be read as something other than an impermissible

attempt to overrule O'Callahan -- is the vague appeal to the totality of changed circumstances since O'Callahan and Relford, of which the Court can identify only the increased concern for victims of crime. But a retreat to such a standardless approach, with each case to be decided ad hoc, in a system that is insensitive to the subtleties of Constitutional law, has no expertise in deciding such issues, and is insulated in large measure from judicial review, would be an abandonment of responsibility to lend clarity to the law. Ironically, it would also revive much of the early criticism that O'Callahan provided insufficient guidance for military courts. Relford unanimously addressed and remedied that concern, 401 U.S. at 357, 370, and provided guidelines that, properly applied, require reversal of the decision below.

### Conclusion

The decision of the Court of Military Appeals should be reversed.

Respectfully submitted,

  
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